CIMB Bank Bhd v Ahmad Suhairi bin Mat Ali & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-01(A)-403–07 OF 2021
NANTHA BALAN, GUNALAN MUNIANDY AND MOHD NAZLAN JJCA
3 AUGUST 2023

Civil Procedure — Judicial review — Certiorari — Claimant's claim for constructive dismissal dismissed by Industrial Court — High Court quashed Industrial Court's award — Whether claim for constructive dismissal was wrongly dismissed by Industrial Court — Whether judicial review warranted

Labour Law — Constructive dismissal — Demotion — Claimant was transferred and re-designated to new role by employer — Whether transfer and re-designation of claimant amounted to demotion — Whether transfer and re-designation of claimant breached implied term of mutual trust and confidence — Whether claimant had proven on balance of probabilities that he had been constructively dismissed — Industrial Relations Act 1967 s 20

Ahmad Suhairi bin Mat Ali ('the claimant') was at the material time employed by CIMB Bank Bhd ('the bank') as the Area Commercial Manager ('ACM') before being redesignated as Team Leader of the Special Acquisitions Team ('SAT'). The claimant had filed a complaint pursuant to s 20 of the Industrial Relations Act 1967 that he had been constructively dismissed. The claimant's claim for dismissal without just cause or excuse was dismissed by the Industrial Court ('the award') but the award was quashed by the learned judicial commissioner of the High Court ('the JC'). The JC then ordered the bank to pay compensation in the sum of RM442,117.20 with costs of RM10,000. Aggrieved with the JC's decision, the bank filed the present appeal to set aside the said decision and to reinstate the award. The main issue for the court's determination was whether the claimant had proven on a balance of probabilities that he had been constructively dismissed. The claimant argued that the bank's decision to transfer and re-designate him, taken together with all the attendant circumstances, including but not limited to the matters raised in the claimant's several emails regarding the redesignation which was unanswered by the bank, cumulatively gave rise to a breach of the fundamental implied term in the contract of employment that the bank as employer, would not do anything to destroy the implied term of mutual trust and confidence that was the bedrock of any employer/employee relationship.

Held, dismissing the appeal with costs of RM10,000 subject to allocator:

(1) It was axiomatic that an employer's exercise of their management prerogative to transfer and/or re-designate an employee could be struck down if it was demonstrated that the transfer/re-designation was in substance a demotion or punishment or that the employee was being victimised or that the decision was actuated by mala fides. Thus, depending on all the circumstances attendant upon the transfer and/or re-designation, an employee may (not necessarily will) be entitled to complain that he had been constructively dismissed if he was able to show that the employer had made substantial changes in the duties and status of the employee as to constitute a fundamental breach of the contract (see paras 142–143).

(2) The claimant in a claim for constructive dismissal had the legal burden of proving that the employer had repudiated the contract of employment. The applicable test for constructive dismissal was the 'contract test'. Based on the said test, it was clear that the occasion on which an employee could complain that he had been constructively dismissed was when he could demonstrate that there had been a non-consensual or unilateral variation of the contract of employment by the employer. Hence, on such occasion, the dissatisfied employee was entitled to consider the variation to be a repudiation of his contract and was entitled to complain that he had been constructively dismissed and so he must, as soon as he perceived that his contract had been varied without his consent, walk out of his employment. Undue delay in responding to the changes that were imposed by the employer was fatal to a claim based on constructive dismissal (see paras 163–164, 167 & 169).

(3) Based on the evidence, it was clear that the position of SAT leader was an inferior position which required the claimant to work alone and without any relationship manager/deputy manager/clerical staff or personal assistant reporting to him. The targets that were imposed were manifestly unrealistic and unachievable as the claimant was alone on the mission that was assigned to him. Based on the facts and circumstances of the present case, the transfer of the claimant to a position where he had to perform tasks which he had performed before he became ACM was a demotion notwithstanding that there was neither a salary reduction nor change in job grade. By issuing the transfer and in failing to manage the claimant's various pleas for intervention by the bank, there was a fundamental breach of the implied term that the bank would not do anything to destroy the implied term of mutual trust and confidence that was the bedrock of any employer/employee relationship (see paras 179, 181–182, 186 & 188).

(4) Based on the evidence, the bank did not respond to the claimant's emails and there was just deafening silence on the part of the bank. It was obvious that the claimant was making every effort to seek a good

outcome and to extricate himself from the position in which the bank had put him. The claimant walked out after one month and 18 days as Team Leader of the SAT whilst temporarily located in Alor Setar. Even if there was delay on the claimant's part, on the facts here, it could not be construed as an affirmation of the unilateral variation of the contract of employment. The court agreed with the JC that there was no affirmation or acquiescence by the claimant. On totality, the court agreed with the decision of the JC who granted certiorari and quashed the award on account of errors of law that had been committed by the Industrial Court. This was a case where the Industrial Court had clearly omitted to consider important aspects of the evidence which supported the claim for constructive dismissal. The Industrial Court had erred in concluding that the claimant had taken on the new role as SAT leader without protest (see paras 135, 189–191 & 194–195).

(5) The court found that this was an exceptional case where a claim for constructive dismissal was wrongly dismissed by the Industrial Court when the evidence pointed to the contrary and where judicial review was warranted because any tribunal which was similarly circumstanced would have concluded that the transfer order was a demotion and that the claimant was being placed in a position which was inferior to the position of ACM and that the bank was guilty of a fundamental breach of the implied term of mutual trust and confidence (see para 196).

[Bahasa Malaysia summary

Ahmad Suhairi bin Mat Ali ('penuntut') pada masa yang material diambil bekerja oleh CIMB Bank Bhd ('bank') sebagai Area Commercial Manager ('ACM') sebelum dilantik semula sebagai Team Leader bagi Special Acquisition Team ('SAT'). Penuntut telah memfailkan aduan menurut s 20 Akta Perhubungan Perusahaan 1967 bahawa dia telah dibuang kerja secara konstruktif. Tuntutan penuntut untuk pembuangan kerja tanpa sebab atau alasan yang adil telah ditolak oleh Mahkamah Perusahaan ('award') tetapi award tersebut dibatalkan oleh pesuruhjaya kehakiman Mahkamah Tinggi yang bijaksana ('PK'). Pesuruhjaya kehakiman kemudiannya mengarahkan bank membayar pampasan dalam jumlah RM442,117.20 dengan kos RM10,000. Terkilan dengan keputusan PK, bank memfailkan rayuan semasa untuk mengenepikan keputusan tersebut dan mengembalikan semula award tersebut. Isu utama untuk penentuan mahkamah ialah sama ada penuntut telah membuktikan atas imbangan kebarangkalian bahawa dia telah dibuang kerja secara konstruktif. Penuntut berhujah bahawa keputusan bank untuk memindahkan dan melantiknya semula, diambil bersama-sama dengan semua keadaan yang ada, termasuk tetapi tidak terhad kepada perkara-perkara yang dibangkitkan dalam beberapa e-mel penuntut mengenai pelantikan semula tersebut yang tidak dijawab oleh bank, secara kumulatif menimbulkan pelanggaran syarat tersirat asas dalam kontrak pekerjaan bahawa bank sebagai

majikan, tidak akan melakukan apa-apa untuk memusnahkan syarat tersirat kepercayaan dan keyakinan bersama yang menjadi asas kepada mana-mana hubungan majikan/pekerja.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000 tertakluk kepada alokator:

(1) Adalah aksiomatik bahawa pelaksanaan oleh majikan ke atas hak prerogatif pengurusan mereka untuk memindahkan dan/atau melantik semula pekerja boleh dibatalkan jika ditunjukkan bahawa pemindahan/pelantikan semula tersebut pada dasarnya adalah penurunan pangkat atau hukuman atau pekerja tersebut menjadi mangsa atau bahawa keputusan tersebut digerakkan oleh mala fides. Oleh itu, bergantung kepada semua keadaan semasa pemindahan dan/atau perlantikan semula tersebut, seseorang pekerja mungkin (tidak semestinya) berhak untuk mengadu bahawa dia telah dibuang kerja secara konstruktif jika dia dapat menunjukkan bahawa majikan telah membuat perubahan yang ketara dalam tugas dan status pekerja yang menyebabkan pelanggaran asas kontrak (lihat perenggan 142–143).

(2) Penuntut dalam tuntutan pembuangan kerja secara konstruktif mempunyai beban undang-undang untuk membuktikan bahawa majikan telah menolak kontrak pekerjaan. Ujian yang terpakai untuk pembuangan kerja secara konstruktif ialah 'ujian kontrak'. Berdasarkan ujian tersebut, adalah jelas bahawa keadaan di mana seseorang pekerja boleh mengadu bahawa dia telah dibuang kerja secara konstruktif adalah apabila dia dapat menunjukkan bahawa terdapat perubahan yang tidak dipersetujui atau perubahan unilateral kontrak pekerjaan oleh majikan. Oleh itu, dalam keadaan sedemikian, pekerja yang tidak berpuas hati berhak untuk menganggap bahawa perubahan tersebut sebagai penolakan kontraknya dan berhak untuk mengadu bahawa dia telah dibuang kerja secara konstruktif dan oleh itu dia mesti, sebaik sahaja dia merasakan bahawa kontraknya telah diubah tanpa persetujuannya, meninggalkan pekerjaannya. Kelewatan yang tidak wajar dalam bertindak balas terhadap perubahan yang dikenakan oleh majikan adalah memudaratkan bagi tuntutan yang berasaskan pembuangan kerja secara konstruktif (lihat perenggan 163–164, 167 & 169).

(3) Berdasarkan keterangan, jelas bahawa jawatan ketua SAT adalah jawatan yang lebih rendah yang memerlukan penuntut bekerja sendiri dan tanpa pengurus perhubungan/timbalan pengurus/kakitangan perkeranian atau pembantu peribadi melaporkan diri kepadanya. Sasaran yang dikenakan adalah nyata tidak realistik dan tidak boleh dicapai kerana penuntut bersendirian dalam misi yang diberikan kepadanya. Berdasarkan fakta dan keadaan kes semasa, pemindahan penuntut ke jawatan di mana dia perlu melaksanakan tugas yang telah dia lakukan sebelum dia menjadi

ACM adalah penurunan pangkat walaupun tiada pengurangan gaji mahupun perubahan dalam gred pekerjaan. Dengan mengarahkan pemindahan dan gagal menguruskan pelbagai rayuan penuntut untuk campur tangan oleh bank, terdapat pelanggaran asas terma tersirat bahawa bank tidak akan melakukan apa-apa untuk memusnahkan terma tersirat kepercayaan dan keyakinan bersama yang menjadi asas kepada mana-mana perhubungan majikan/pekerja (lihat perenggan 179, 181–182, 186 & 188).

(4) Berdasarkan keterangan, bank tidak membalas e-mel penuntut dan hanya mendiamkan diri. Jelas sekali bahawa penuntut telah berusaha sedaya upaya untuk mendapatkan hasil yang baik dan melepaskan diri daripada kedudukan yang telah diletakkan oleh bank kepadanya. Penuntut telah keluar selepas sebulan 18 hari sebagai Ketua Pasukan SAT sementara ditempatkan secara sementara di Alor Setar. Walaupun terdapat kelewatan di pihak penuntut, berdasarkan fakta di sini, ia tidak boleh ditafsirkan sebagai pengesahan variasi unilateral kontrak pekerjaan. Mahkamah bersetuju dengan PK bahawa tiada pengesahan atau akur oleh penuntut. Secara keseluruhannya, mahkamah bersetuju dengan keputusan PK yang memberikan certiorari dan membatalkan award atas kekhilafan undang-undang yang telah dilakukan oleh Mahkamah Perusahaan. Ini adalah kes di mana Mahkamah Perusahaan dengan jelas tidak mempertimbangkan aspek penting keterangan yang menyokong tuntutan untuk pembuangan kerja secara konstruktif. Mahkamah Perusahaan telah terkhilaf dalam membuat kesimpulan bahawa penuntut telah mengambil peranan baru sebagai ketua SAT tanpa bantahan (lihat perenggan 135, 189–191 & 194–195).

(5) Mahkamah mendapati bahawa ini adalah kes luar biasa di mana tuntutan untuk pembuangan kerja secara konstruktif telah ditolak secara salah oleh Mahkamah Perusahaan apabila keterangan menunjukkan sebaliknya dan di mana semakan kehakiman adalah wajar kerana mana-mana tribunal yang berada dalam keadaan yang sama akan membuat kesimpulan bahawa arahan pemindahan tersebut adalah penurunan pangkat dan penuntut diletakkan dalam kedudukan yang lebih rendah daripada jawatan ACM dan bahawa bank bersalah atas pelanggaran asas terma tersirat kepercayaan dan keyakinan bersama (lihat perenggan 196).]

Cases referred to

Ahmad Suhairi bin Mat Ali v CIMB Bank Bhd & Anor [2021] MLJU 1831; [2021] 1 LNS 1572; [2021] AMEJ 1512; [2021] MLRHU 1388, HC (refd)

Ahmad Suhairi Mat Ali v CIMB Bank Berhad [2019] 2 LNS 1618; [2019] MELRU 1618, IC (refd)

Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar

Singh [2000] 3 MLJ 714; [2000] 1 MLRA 664, CA (refd)
Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd [1998] 2 MLJ 599; [1998] 2 CLJ 197, CA (refd)
Bayer (M) Sdn Bhd v Anwar bin Abd Rahim [1995] MLJU 558; [1996] 2 CLJ 49, HC (refd)
Christoph Hoelzl v Langkawi Island Resort Sdn Bhd [1998] 6 MLJ 162; [1998] 1 LNS 87; [1998] 5 MLRH 531, HC (refd)
Hong Leong Bank Bhd v Lee Sang Huat [2005] ILJU 88; [2005] 2 ILR 172; [2005] 1 MELR 632, IC (refd)
Hotel Malaya v Goh Hock Fong @ Goo Hak Pong [1994] 2 MELR 627; [1994] 2 ILR 810, IC (refd)
Ladang Holyrood v Ayasamy a/l Manikam & 16 Ors [2004] 3 MLJ 339; [2004] 4 AMR 621; [2004] 2 CLJ 697; [2004] 1 MLRA 341, CA (refd)
Lee Sang Huat v Hong Leong Bank Berhad & Anor [2011] 1 LNS 1056, HC (refd)
Lewis v Motorworld Garages Ltd [1986] ICR 157, CA (refd)
Malayan Banking Berhad v Marcus Wong & Anor [2015] MLJU 1965; [2016] 1 LNS 1712; [2015] MLRHU 1447, HC (refd)
Marcus Wong v Malayan Banking Berhad [2015] 2 LNS 245; [2015] 3 MELR 129, IC (refd)
Marriott v Oxford and District Co-operative Society Ltd (No 2) [1970] 1 QB 186; [1969] 3 All ER 1126; [1969] 3 WLR 984, CA (refd)
Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493; [2006] 3 AMR 555; [2006] 2 CLJ 501, CA (folld)
Moo Ng v Kiwi Products Sdn Bhd Johor & Anor [1998] MLJU 83; [1998] 3 CLJ 475; [1998] 2 MLRH 2023, HC (refd)
Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 2 MLRA 114; [2003] 4 CLJ 625, FC (refd)
Pexxon Sdn Bhd v Sia Qui Yau [1989] 1 ILR 240 (refd)
Shahabudin Abdul Rashid v Talasco Insurance Sdn Bhd [2004] 4 CLJ 514; [2004] 2 MLRA 165, CA (refd)
Southern Investment Bank Bhd/Southern Bank & Anor v Yap Fat & Anor [2017] 3 MLJ 327; [2017] 8 CLJ 159; [2017] 3 MLRA 408, CA (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 1 MLRA 268; [1995] 2 AMR 1601; [1995] 2 CLJ 748, CA (refd)
Teng Tong Kee v Nikmat Jasa Piling Sdn Bhd [2006] 1 CLJ 1199; [2006] 1 MLRA 70, CA (distd)
Western Excavating (ECC) Ltd v Sharp [1978] QB 761; [1978] 1 All ER 713; [1978] 2 WLR 344; [1978] IRLR 27; [1978] ICR 221, CA (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92; [1988] 1 CLJ 45; [1988] 1 CLJ Rep 298; [1988] 1 CLJ 45; [1987] 1 MLRA 346, SC (refd)
Woods v WM Car Services (Peterborough) Ltd [1982] IRLR 413; [1982] ICR 693; [1982] Com LR 208, CA (refd)

Legislation referred to

Industrial Relations Act 1967 ss 13(3)(b), 20

Appeal from: *Ahmad Suhairi bin Mat Ali v CIMB Bank Bhd & Anor* [2023] 8 MLJ 586 (High Court, Penang)

Thavalingam C Thavarajah (with David Tan Seng Keat) (T Thavalingam & Company) for the appellant.

Pravin Kaur Jessy (with Nor Azrah bt Mohd Salim) (Mehgala & Co) for the first respondent.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by CIMB Bank Bhd ('the bank'). The first respondent is En Ahmad Suhairi bin Mat Ali He was the claimant in the Industrial Court. For convenience, we shall refer to the appellant as 'the bank', and the first respondent as 'the claimant'. This is a case of 'constructive dismissal'. The claimant's claim was dismissed by the Industrial Court. The High Court allowed judicial review and quashed the award of the Industrial Court and granted the relief of compensation. We have dealt with the law on constructive dismissal in some detail before analysing the facts and the legal issues relevant to the claim The detailed background facts are found at para 34 onwards of this judgment. This court's analysis, decision and the reasons for the same are at para 74 onwards.

[2] The claimant was at all material times an employee of the bank. This case emanated from a complaint by the claimant pursuant to s 20 of the Industrial Relations Act 1967 ('the Act') that he had been 'constructively dismissed' by the bank. The complaint of constructive dismissal was precipitated by the bank's transfer and re-designation order per their letter dated 8 May 2012. In the context of the complaint that was presented to the Industrial Court, the question was whether the claimant had established that the bank had breached an implied term of the contract of employment that they would not make such substantial changes in the duties and status of claimant as to constitute a fundamental breach of contract.

[3] The Industrial Court was duty bound to examine the evidence, both oral and written, and determine whether in all the circumstances, the responsibilities and duties of the claimant had been so altered by the bank as to constitute a breach of a fundamental (implied) term of the contract of employment. The claim for dismissal without just cause or excuse was dismissed by the Industrial Court per Award No 1618 of 2019 dated 29 May

2019 ('the award'). The award is reported as *Ahmad Suhairi Mat Ali v CIMB Bank Berhad* [2019] 2 LNS 1618; [2019] MELRU 1618 (IC). A

[4] The claimant then applied to the High Court for judicial review to quash the award. He maintained that the award was liable to be quashed as there were errors of law in the decision of the Industrial Court to dismiss the claim. The claimant contended that the Industrial Court committed errors of law of the type as explained and enunciated by the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 1 MLRA 268; [1995] 2 AMR 1601; [1995] 2 CLJ 748 (CA). The relevant passage where the Court of Appeal discussed the concept of error of law is at p 342 of the MLJ report which reads as follows: B C

> An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. *If an inferior tribunal or other public decision maker does make such an error, then he exceeds his jurisdiction. So too, is jurisdiction exceeded where resort is had to an unfair procedure (see Raja Abdul Malek v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308; [1995] 1 CLJ 619), *or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.* D E
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> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that *an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.* (Emphasis added.) F

[5] In this regard, the claimant argued that the Industrial Court failed to take into account relevant evidence which established conclusively that the responsibilities and duties of the claimant had been so altered by the bank as to constitute a fundamental breach of his contract of employment. In substance, the claimant contended that the transfer/re-designation per the bank's letter dated 8 May 2012 was a 'demotion' and that he was entitled to walk out of employment and claim that he had been constructively dismissed. G H

[6] On 13 July 2021, the High Court allowed judicial review and quashed the award and ordered the bank to pay compensation in the sum of RM442,117.20 with costs of RM10,000. The High Court's decision is reported as *Ahmad Suhairi bin Mat Ali v CIMB Bank Bhd & Anor* [2021] MLJU 1831; [2021] 1 LNS 1572; [2021] AMEJ 1512; [2021] MLRHU 1388 (HC). Hence, the bank's appeal to this court. I

[7] In this appeal the bank is essentially seeking to set aside the judicial

commissioner's said decision and for the award to be reinstated. The central question in this appeal is whether the claimant had proven on a balance of probabilities, that he had been constructively dismissed.

CONSTRUCTIVE DISMISSAL — THE LAW

[8] Before undertaking a detailed examination of the factual circumstances which gave rise to the claim, it would be convenient to identify at this stage the legal definition and principles which are applicable to the concept of constructive dismissal.

[9] The starting point is the seminal decision of the English Court of Appeal in *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761; [1978] 1 All ER 713; [1978] 2 WLR 344; [1978] IRLR 27; [1978] ICR 221 which is generally regarded as the locus classicus on constructive dismissal. At p 717 (All ER) Lord Denning MR explained the concept in the following manner:

> If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.
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> The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

[10] Thus, it is generally understood and accepted that constructive dismissal means no more than the common law right of an employee to 'consider' himself as having been dismissed, ie, in the circumstances where the conduct of the employer is such that it constitutes a breach which goes to the root of the contract or where the employer has evinced an intention no longer to be bound by the express or implied terms of the contract of employment. In such a situation, the employee is entitled to regard himself as being dismissed and walk out of his employment.

[11] In Malaysia, the concept of 'constructive dismissal' was given judicial recognition by the then Supreme Court in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92; [1988] 1 CLJ 45; [1988] 1 CLJ Rep 298; [1988] 1 CLJ 45; [1987] 1 MLRA 346 (SC) ('Wong Chee Hong'), In *Wong Chee Hong*, the claimant ('Mr Wong') was the Personnel and

Industrial Relations Manager of Cathay Organisation (M) Sdn Bhd ('Cathay') for the whole of Malaysia'. In that capacity, Mr Wong negotiated and concluded a collective agreement with the Union. However, the management of Cathay were displeased with Mr Wong because he had concluded the collective agreement with the Union without their approval. Mr Wong was in the process of implementing the newly negotiated collective agreement when he was abruptly issued with a transfer order and asked to report for duty as cinema manager of Cathay's cinema theatre at Overseas Union Garden, Kuala Lumpur. He was informed that the terms and conditions of his employment remained unchanged. He refused to abide by the transfer order. He walked out and lodged a complaint under s 20 of the Act.

[12] The Industrial Court held in favour of Mr Wong and ruled that he had been 'constructively dismissed'. However, the High Court granted judicial review and quashed the Industrial Court's award. On appeal by Mr Wong, the Supreme Court upheld the decision of the Industrial Court and reinstated the award. The Supreme Court adopted the definition of constructive dismissal given by the English Court of Appeal in *Western Excavating* and said that the word 'dismissal' in s 20 of the Act should be interpreted with reference to the common law principle and 'it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situation the employee is entitled to regard the contract as terminated and himself as being dismissed'.

[13] The Supreme Court stated unequivocally that the conduct complained of must be measured against the 'contract test' and not the 'unreasonableness test'. The practical effect of the contract test may be seen from the Supreme Court's analysis of Cathay's conduct vis a vis Mr Wong's contract of employment, at p 96 of the MLJ report where they said:

> There can be no doubt, as found by the Industrial Court, that the appellant was lawfully doing his duty as the Personnel and Industrial Relations Manager of the respondent company when he negotiated a new collective agreement, represented the respondent company in the negotiations, obtained an award, and implemented it.
>
> The reward for lawfully performing his duties was not promotion, but a demotion. From being the head of one of the respondent company's departments, he was reduced to a mere cinema manager, a position which he had held some fifteen years ago as a junior executive.
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> *No doubt his terms and conditions of service remained unaltered and the transfer was part of the terms of his employment.*
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> But with respect, we cannot accept that either of these two factors or both of them entitled the respondent company to insist upon the appellant to obey its instruction.
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> The respondent company must have known that *no man worthy of a minimum*

self-respect would accept a transfer with a demotion in rank, stripped of all the powers he once enjoyed amongst his fellow employees. This is not a transfer but a demotion, a punishment meted out without any disciplinary action taken.

What is worse is that it was inflicted not for doing a wrong act, but for doing the right thing — ie to negotiate and conclude a new collective agreement, which ended in an Industrial Court award and to implement it. The appellant may well be hasty in that he did not obtain permission from nor consult his superior officer (MD) before implementing the award, but this error in our view hardly justifies sending the appellant down without power and designation. One of the higher interests of law is surely that an order of the court — and this included awards of the Industrial Court — must be obeyed; otherwise the system of justice will be thrown helter-skelter with grave consequences, leading to erosion of public confidence in it.

The respondent company's plea that the appellant's terms and conditions of service remained unaffected, in our view, sounds so hollow that it belies its truth and sincerity. We have perused the award of the Industrial Court and we fully concur with the comments, observation and findings made in the award regarding these two factors. Thus, in our judgment the *transfer, which relegated the applicant to a position of lesser responsibilities, albeit on the same terms and conditions of service, which transfer the appellant refused to accept, is a dismissal*.

It clearly shows that not only the respondent company was displeased with the appellant but it also *exhibited the respondent company's intention not to be bound by the contract any longer. Such relegation of responsibility with its consequent humiliation and frustration and loss of estimation amongst his fellow employees made it impossible for the appellant to carry on beinq employed under the respondent company's organisation. In other words, he had been driven out of his employment.* This is therefore a dismissal. (Emphasis added.)

[14] In the case of *Bayer (M) Sdn Bhd v Anwar bin Abd Rahim* [1995] MLJU 558; [1996] 2 CLJ 49 (HC) Low Hop Bing JC (as he then was) applied the principle that was enunciated in *Wong Chee Hong* and reiterated that the test in a constructive dismissal case is not the 'test of unreasonableness', but the 'contract test'. The learned judge rendered a lucid explanation on the test and the conditions which must be fulfilled in the following words (pp 52–53 of the CLJ report):

In my judgment, in order to succeed in a claim for constructive dismissal, the employee must prove to the satisfaction of the court that the employer is guilty of a breach which goes to the root of the contract or if the employer has evinced an intention no longer to be bound by it. It is only in such a situation that the employee is entitled to regard the contract as terminated and treat himself as being dismissed. *Constructive dismissal does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed, if it were so, it is dangerous and can lead to abuse and unsettled industrial relations,* Thus, it is settled law that the test applicable in a constructive dismissal case is 'the contract test' and not 'the test of reasonableness'. To claim constructive dismissal, *four conditions must be fulfilled.* These conditions are:

(1) *there must be a breach of contract* by the employer;

(2) the *breach must be sufficiently important* to justify the employee resigning;

(3) the *employee must leave in response to the breach* and not for any other unconnected reasons; and

(4) *he must not occasion any undue delay* in terminating the contract, otherwise he will be deemed to have waived the breach and agreed to vary the contract.

[15] In *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599; [1998] 2 CLJ 197 (CA) Mahadev Shankar JCA affirmed the decision is the 'contract test'.

[16] At pp 605–606 of the MLJ report Justice Shankar said:

> It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract'.

[17] Consequently, that the relevant test for constructive dismissal is the 'contract' test and not the 'unreasonableness' test. In this context, the Supreme Court in *Wong Chee Hong* at (p 95 MLJ) stated:

> Constructive dismissal does not mean that an employee cam automatically terminate the contract when his employee act or behaves unreasonably towards him. Indeed, if it were so, it is dangerous and can lead to abuse and unsettled industrial relations.

THE LEGAL PRE-REQUISITES FOR CONSTRUCTIVE DISMISSAL

[18] From the perspective of the 'contract test', constructive dismissal is essentially and conceptually predicated on the employer's unilateral variation of the contract of employment which amounts to a fundamental breach and regarded as conduct which is repudiatory of the contract of employment, entitling the employee to walk out and claim that he had been constructively dismissed.

[19] Thus, two questions arise for consideration in determining whether a claim based on constructive dismissal can succeed. The first question is — did the employer's conduct amount to a breach of the contract of employment going to the root of the contract, (ie 'fundamental breach')? The second question is — did the employee make up his mind and act at the appropriate point in time soon after the conduct of which he had complained had taken place? This takes us to the question of delay on the part of the employee.

DELAY MAY DEFEAT CONSTRUCTIVE DISMISSAL

[20] For a complaint of constructive dismissal to succeed in the Industrial Court, it is essential and vital that the employee should act with haste as any delay may potentially be fatal to a claim of constructive dismissal. This is because the employee's delay in responding to or protesting against the unilateral variation of the contract of employment may be construed as an acceptance or acquiescence to such unilateral variation. In *Pexxon Sdn Bhd v Sia Qui Yau* [1989] 1 ILR 240, the Industrial Court dealt with the question of the employee's delayed response to a fundamental breach by the employer and said:

> So the length of time is a crucial factor by which the claimant must act to repudiate the contract based on the breach that goes to the root of that contract. The period of one month has been held to be unreasonable for the claimant not to have acted against his employer.
>
> It seems that once an employee has discovered that there is substantial breach or breaches of employment that goes to the root of the contract of the employment he must so act immediately either by protesting or giving notice to the employer and walking out of the job, otherwise he might be said to have affirmed the new term of the contract, thereby accepting it with the terms added. *All this is to be decided on the facts of each case.* (Emphasis added.)

DELAY NOT ALWAYS FATAL

[21] But, if the employee stays on *under protest*, then the delay may not necessarily be fatal. It will all depend on the circumstances. The case in point is the decision of the English Court of Appeal in *Marriott v Oxford and District Co-operative Society Ltd (No 2)* [1970] 1 QB 186; [1969] 3 All ER 1126; [1969] 3 WLR 984 ('*Marriott*'s case'). In *Marriott*'s case, the employer wrote to the employee a letter which (according to the English Court of Appeal) had the effect of saying 'We are not going to perform our existing contract with you. We are going to reduce your grading as foreman and we are going to pay you £1 a week less, whether you like it or not'.

[22] The employee did not leave immediately. He protested, but continued to work for the respondent for some weeks. He applied to the Industrial Tribunal for a redundancy payment. The issue was whether the employee had lost his right to claim redundancy payment because he had worked for a few weeks after receiving the impugned letter.

[23] The Court of Appeal held that the employee did not lose the right to redundancy payment because he vehemently protested against the alternative employment that was offered to him at a reduced status and with a reduced wage level. The employee continued to perform his tasks under the contract despite these changes, until he could take it no more.

[24] Lord Denning MR concluded that by staying on a few weeks, the employee did not lose his right to redundancy payment and that by their letter, the employer who was 'dictating' terms to the employee, to which the employee protested and did not accept. This is how Lord Denning analysed the case:

> Seeing that the letter was not an offer, the next question is: was it a termination of the contract of employment by the employer within the meaning of section 3(1)(a) of the Act? I think it was. This letter in effect told the man: 'We are not going to perform our existing contract with you. We are going to reduce your grading as foreman and we are going to pay you £1 a week less, whether you like it or not'. That statement was a breach of contract: see *Withers v Reynolds* (1831) 2 B & Ad 882; *Hochster v De La Tour* (1853) 2 E & B 678. It was what lawyers call a repudiation of the contract. It evinced an intention no longer to be bound by the contract.
>
> If Mr Marriott had accepted the repudiation and said 'I will not agree to this reduction in my wages,' and left at the end of the week, the contract would clearly have been terminated by the employer, and he would be entitled to redundancy payment. There can be no doubt about it. *Does he lose his redundancy payment simply because he stayed on for three or four weeks whilst he got another job? I think not. He never agreed to the dictated terms. He protested against them. He submitted to them because he did not want to be out of employment. By insisting on new terms to which he never agreed, the employer did, I think, terminate the old contract of employment.* The case falls within section 3(1)(a) of the Redundancy Payments Act, 1965. The man is entitled to redundancy payment.

[25] In the same case, Cross LJ said:

> So, as I see it, the only question for us to determine is whether the letter of January 24 was a termination of the contract by the employer — a matter upon which there was some uncertainty and fluctuation of opinion in the various judgments below. The letter says, in effect, 'You will have to leave our employment at the end of the month unless you accept the reduction of £1 a week'. So, it can be argued that it would only have operated as a termination by the employer if Mr Marriott had not accepted the terms.
>
> But in all the circumstances of this case, including the fact that Mr Marriott continued to protest about the reduction even after he received the letter, *I think it would be wrong to treat the fact that he went on working and put up with the reduction for a few weeks as showing that agreement was reached without a previous termination of the contract by the employer. If one looks at the realities of the case, the* contract was terminated by the employer by that letter.

[26] The question of whether in any particular situation, the affected employee had affirmed the contract of employment (as unilaterally varied by the employer) is a question of fact which is to be decided by reference to the entire gamut of circumstances. In the present case before us, the Industrial Court opined that there was delay and non-protest by the claimant which was held to be fatal to the claim of constructive dismissal.

[27] We will address the delay/non-protest points together with several other matters in the later part of the judgment. The gravamen of the claimant's case is that he vehemently objected to the bank's transfer and re-designation order as it resulted in a substantial change in the duties and status of the claimant as to constitute a fundamental breach of the contract of employment. The claimant regarded the transfer and re-designation as a demotion.

SUBSTANTIAL CHANGES TO DUTIES AND STATUS

[28] Thus, having regard to the nature of the claimant's complaint vis a vis the bank's transfer and re-designation order, it is perhaps relevant to quote the following passage from the decision of the High Court in *Moo Ng v Kiwi Products Sdn Bhd Johor & Anor* [1998] MLJU 83; [1998] 3 CLJ 475 at p 498; [1998] 2 MLRH 2023 which neatly and succinctly encapsulated the principle of constructive dismissal as applicable to a complaint that the employer has made such substantial changes to the duties and status.

> If an employee asserts that he has been constructively dismissed, he must establish that there has been conduct on the part of the employer which breaches an express or implied term of the contract of employment going to the very root of the contract. *It can safely be said that one term which, if not express, may be implied in a contract of employment and it is that the employer will not make such a substantial change in the duties and status of the employee as to constitute a fundamental breach of the contract.*
>
> What has to be ascertained is *whether in all the circumstances of the case the responsibilities and duties of the employee have been so altered by the employer as to constitute a breach of a fundamental term of the contract of employment.* (Emphasis added.)

[29] In the present appeal, the catalyst for the claim of constructive dismissal was the decision by the bank to transfer and re-designate the claimant. The Industrial Court ruled that the claimant had failed to prove that he had been constructively dismissed and accordingly dismissed the claim.

[30] The Industrial Court concluded that there was no evidence of any fundamental breach of the contract of employment by the bank and that in any event, the claimant did not protest against the transfer and re-designation. The Industrial Court also concluded that the claimant had delayed in responding to the transfer/re-designation and the delay amounted to an affirmation of the contract and was accordingly not entitled to complain that he had been constructively dismissed. As such the Industrial Court dismissed the claimant's claim under s 20 of the Act.

[31] The claimant challenged the award via an application to the High Court for judicial review. On 13 July 2021, the learned judicial commissioner

of the High Court granted judicial review and quashed the award and made consequential orders in favour of the claimant. The judicial commissioner was of the view that the award was tainted with errors of law and accordingly granted judicial review and quashed the award. The judicial commissioner made the following consequential orders against the bank:

(i) Compensation in lieu of reinstatement

RM10,731 (applicant's last drawn salary) x 22 (number of years of service) = RM236,082;

(ii) Back-wages for 24 months

RM10,731 x 24 = RM 257,544 minus 20% deduction for post dismissal earnings (as agreed by parties) = RM206,035.20.

THE BANK'S APPEAL

[32] The bank relies on the following grounds (with emphasis added) (per the memorandum of appeal):

1. The learned Judicial Commissioner erred in law and in fact when he quashed Industrial Court Award No. 1618 of 2019 and found that the [Claimant] had been dismissed without just cause or excuse and ordered damages to be paid in the amount of RM442,117.20 and costs of RM10,000;

2. The learned Judicial Commissioner erred in law and in fact when he subjected to review and ultimately disturbed and overturned the findings of fact made by the [Industrial Court] which were based upon the testimony and credibility of witnesses;

3. The learned Judicial Commissioner erred in law and in fact when he substituted his own conclusions for those of [Industrial Court] based on a balance of probabilities, notwithstanding that the conclusions of the [Industrial Court] were not grounded on illegality or irrationality and were supported by both cogent oral testimony and documentary evidence, including the [claimant's] own evidence, which was accepted by the [Industrial Court] as proving that the *transfer* of the [claimant] to the Special Acquisitions Team *was actuated for bona fide business purposes and did not amount to a demotion*;

4. The learned Judicial Commissioner erred in law and in fact when he substituted his own conclusions for those of [Industrial Court] notwithstanding that the conclusions of the [Industrial Court] were not grounded on illegality or irrationality and were supported by both cogent oral testimony and documentary evidence which was accepted by the [Industrial Court] as proving on the balance of probabilities that the claimant was never dismissed by the appellant;

5. The learned Judicial Commissioner erred in law and in fact when he *failed to apply and/or incorrectly applied the appropriate legal test for constructive*

dismissal, ie the 'contract test' and the [claimant's] *dissatisfaction with the order of transfer did not amount to constructive dismissal*;

6. The learned Judicial Commissioner erred in law and in fact when he failed to appreciate that the [claimant] had *implicitly accepted the transfer when he had requested to be provided with business materials and stationery*;

7. The learned Judicial Commissioner erred in law and in fact when he failed to appreciate that the *delaysin providing the [claimant] with various business materials and stationery was due to the [claimant's] own request to be temporarily based in Alor Setar before his relocation to Penang*;

8. The learned Judicial Commissioner erred in law and in fact when he failed to appreciate that *the [claimant] had accepted the transfer effective 1.6.2012 and had only claimed constructive dismissal more than a month and a half later, via letter dated 18.7.2012*;

9. The learned Judicial Commissioner erred in law and in fact when he failed to take into account the relevant fact that the [Industrial Court] had reached a rational decision whereby any reasonable body or person or tribunal similarly circumstanced could have come to such a decision based on the evidence and documentation before it.

10. In all the circumstances of this matter and on the grounds stated above, the learned Judicial Commissioner had erred in fact and/or in law in allowing the [Industrial Court's] application for judicial review.

THE FACTS

[33] The claimant joined the bank as a trainee officer in 1990 was in employment with the bank for 22 years. He rose up the ranks and at the material time when the complaint of constructive dismissal arose in 2012, he held the position of Area Commercial Manager ('ACM') for the bank's operations in the States of Kedah/Perlis. If we were to use the claimant's annual performance bonus and salary increment as an indicator, then it would be fair to say that he did reasonably well in terms of his performance over the years.

[34] But the record did show that the claimant's performance in 2009 and 2011 was below the bank's expectations and as such he did not receive any performance bonus and salary increment for those years (see: para 5 of the bank's statement in reply).

[35] In fact, by letter dated 21 March 2012 (which is relatively proximate to the impugned letter by which the claimant was informed of his transfer and re-designation to Penang) the claimant was informed that he would not be receiving any bonus for 2011 due to his poor performance. It is implicit from that letter that there would be no salary increment as well. By the same letter

the claimant was also informed (quite ominously) that his performance was being monitored and that action would be taken if he did not show significant improvement. The relevant part of that letter reads as follows:

> The Group views your unsatisfactory performance seriously and you are required to take the necessary steps to rectify your shortcomings. We will be reviewing your performance on regular basis and if there is no significant improvement in your performance, the Group reserves the right to take necessary disciplinary action.

[36] During the proceedings before the Industrial Court, the bank (through COW5's evidence) took the position that the claimant's strength was in 'sales' and thus the decision to re-designate him as Team Leader of the Special Acquisitions Team ('SAT') to be based in Penang. But it is interesting to note that the bank did not present any tangible evidence before the Industrial Court to show that any review of the claimant's performance was carried out since the issuance of their letter dated 21 March 2012.

[37] Thus, it would appear that despite his unsatisfactory performance in 2011, the claimant was somehow 'chosen' to be the Team Leader for the SAT with a loan target of RM127m (from new customers) which was to be achieved within six months.

[38] The claimant lamented that he had no support staff to assist him in this endeavour It was contended for the claimant that the odds were stacked against him and there was a deliberate effort on the part of the bank to ensure that the claimant would not achieve the relevant sales target as the Team Leader of the SAT.

[39] At any rate, for reasons which remain shrouded in obscurity and opaqueness, the bank (for reasons best known to them) decided to re-designate the claimant from ACM to Team Leader of the SAT which was to be set up and based in Penang.

[40] It is undeniable that the claimant was livid and took umbrage with the bank's re-designation and transfer order. He protested vigorously via his several emails. These are dealt with more comprehensively elsewhere in this judgment. The claimant alleged that the transfer/re-designation was a demotion, that it was actuated by mala fides and that he had been victimised. As such, the claimant claimed that he was constructively dismissed and walked out of his employment on 18 July 2012. The bank maintains that there was nothing sinister or mala fide about the transfer/re-designation.

[41] The bank argued (successfully before the Industrial Court) that by walking out about one month and 18 days after starting work as Team Leader of the SAT, albeit temporarily located at the Alor Setar branch, the claimant

had lost the right to claim constructive dismissal. We may turn now to the transfer and the claimant's response or protest to the transfer/re-designation.

TRANSFER/RE-DESIGNATION

[42] As mentioned earlier, the claimant sent several emails to the bank in relation to the transfer and re-designation as Team Leader of the SAT. These letters are self-explanatory. It is important to emphasise that there was no contemporaneous response by the bank to the claimant's said emails. Essentially, the claimant was challenging the transfer order by claiming that he was being victimised, that the transfer was not bona fide, and that the transfer was a demotion. However, instead of robustly addressing, repudiating and decimating the serious allegations that were being ventilated in the claimant's emails' there was just deafening silence from the bank with regard to the several issues that the claimant had raised in his correspondence.

[43] To be fair to the bank, after the transfer/re-designation letter was issued, there was at least one meeting between the claimant and one En Ahmad Shazli bin Kamarulzaman (COW5) ('Shazli') on 30 May 2012, Shazli was at that time the Head of Commercial Banking, But it seems that nothing came out of the meeting with Shazli and there was also no written response by the bank by way of rebuttal, clarification or at the very least, a response to placate the claimant.

[44] The claimant did however send an email to Shazli to thank him for the meeting and to convey his sentiments on his transfer to Penang and re-designation as Team Leader of the SAT.

[45] In order to understand and appreciate the claimant's position and indeed, his deep-rooted frustration, it is necessary and imperative to reproduce most of the contents of these letters which will throw light on the background, context and reasons for the claimant's vociferous objections to the transfer and re-designation.

[46] The starting point is obviously the bank's letter dated 8 May 2012 ('the transfer letter') by which the claimant was officially informed of his transfer as SAT Team Leader and that he was to report to Mr Seng Kok Wing, Head of Commercial Sales and Commercial Banking. Mr Seng Kok Wing is referred to in some of the correspondence as 'SKW'. He testified as the bank's fourth witness (COW4). In this judgment we shall refer to him as 'Seng'. Another person who was involved in the narrative of the events was the claimant's then direct report, ie Damian Oh Kok Huat (COW1) ('Damian') who was Head, Northern Region (Commercial Banking). Before the claimant received the transfer letter he had already heard rumours that he was to be transferred to Penang and he spoke to Damian about it.

[47] The claimant then met up with Damian and one Michael Ong ('Michael') (who was also an ACM). Michael did not testify at the Industrial Court. According to the claimant, Damian told him that the bank was not happy with the audit rating and that they needed a Chinese person to be the ACM as the customers were mostly Chinese, Before the Industrial Court, Damian denied saying these things to the claimant.

[48] At any rate, Michael did in fact take over from the claimant as ACM with effect from 15 May 2012 which was two weeks before the claimant would have had to start as Team Leader of the SAT in Penang, On 10 May 2012, the claimant also spoke to Seng about the transfer. The chronology of the events with regard to the discussions and as to what was allegedly said or represented to the claimant are as stated in his own words in his email dated 11 May 2012 to Shazli (see paras 51–53 below) and email dated 12 May 2012 to Engku Mohamad Fauzan Engku Muhsein (Deputy Head of Commercial Banking) (see para 54 below).

THE TRANSFER LETTER (8 MAY 2012)

[49] The transfer letter reads as follows:

> *TRANSFER TO SPECIAL ACQUISITION TEAM (PENANG), COMMERCIAL SALES, COMMERCIAL BANKING*
>
> This is to inform that you will be transferred to Special Acquisition Team (Penang), Commercial Sales, Commercial Banking based at Level 3, Menara BHL, No 51, Jalan Sultan Ahmad Shah, 10050 Georgetown, Penang as Team Leader effective 1 June 2012.
>
> Kindly report to Mr Seng Kok Wing, Head of Commercial Sales, Commercial Banking, who will brief you on your new duties and responsibilities. Your position related monthly allowance and car plan as Area Commercial Manager will cease effective 1 June 2012.
>
> To facilitate a smooth hand over of function, kindly complete all your assignments prior to your transfer to the new workplace. In addition, kindly complete your Performance Appraisal via e-PMS prior to your transfer.
>
> We look forward to your continuous support and contribution towards the progress of CIMB Bank Berhad.

[50] The claimant received the transfer letter on 10 May 2012. He sent an email dated 11 May 2012 to Shazli. At the time of the hearing before the Industrial Court, Shazli held the position of Deputy Chief Executive Officer — Group Commercial Banking. Shazli was the bank's fifth witness. In the email to Shazli, the claimant expressed his disappointment at being transferred to the newly set up SAT. In his email, the claimant alluded to the 'discussions' which was in reference to his meeting with Damian and Seng after he heard

rumours about him transferred to Penang. In the course of these discussions the claimant was purportedly told that the management was not happy with the 'audit rating'.

[51] Thus, in his email to Shazli, the claimant attempted to offer a rebuttal to his 'audit rating'. In this regard he stated in his email (which we have reproduced in the following paragraphs replete with typographical errors and without any amendment on our part):

> 1. The outcome of discussion was very dissapointed on my part as the reasons given to me for proposed transfer to newly set up SAT unit in Penang is vogue.
>
> The reason given to me is quite general your audit ratings above average and management is not happy about that.
>
> I feel I was made a scapegoat as out of 15 audit finding given to CBC Kedah/Perlis, 8 was collectively signed by *former RM/ABM and CCM* whilst the other *5 was solely signed by former CCM/BCA/BAO (formerly under CREDIT of Business Banking).*
>
> The accountability and responsibilities was based on business model approved between CSD and Business banking since 2006 and lasted until Dec 2011 (memo attached), To illustrate my points, attached herewith overall audit finding as at 3/5/2012 at CBC Sg Petani (see attachment).

[52] In the said email, the claimant alleged that the bank was not being fair to him. He alleged:

> I'm puzzled with management decision to transfer me out. Accountability and responsibility should be collectively shared as our previous business model adopted for [sic] 2006 to 2011 has clearly defined each and everyone job functions. All audit findings was occured [sic] between 2008–2011 where the previous business model apply. It look that I'm the only one who has to pay a price for somebody else mistake but Credit Control Manager (formely [sic] known as Business Credit Manager) is getting scott free even though one of the finding contravene BAFIA. What I'm asking from you is some fairness, Shazli.

[53] The claimant also raised the spectre of being 'victimised' which is apparently connected to the audit rating issue. The allegation of victimisation was stated in the following terms:

> If I were to made adjustment in term of AUDIT rating, my overall KPI will still be at 2.8 and ranked no 8 among 21 CBC in Malaysia. Based on the above statistic also CBC Kedah/Perlis performance is improving compared to 2011 and CBC Kedah was not even listed as the lowest in every categories.
>
> As a Muslim, I feel I was 'victimised' and 'diininayai'. As such, I'm humbly request and appealing to you as another fellow Muslim brother to reconsider Management decision to relocate me to Penang on humanitarian and justice ground. As a leader, I would appreciate your fairness in dealing with this kind of issues.

Being a local with extensive network, please let me be in Alor Setar as a Head of Alor Setar Subcenter or Head-SAT Nothern (sic) Kedah/Perlis for a trial period of 6 months or more for the following reasons:

1. Alor Setar Sub Center has been identified among 5 new Commercial Center based on Management plan presented during our AMD meeting at Palm Garden Resort on 14–15 Feb 2012.

2. I can give immediate impact to bank bottom line as I'm personally working on a few deal to the tune of more than RM 20m. Alor Setar customers has contributed more than 60% of LA, 80% of LAAD and 73% of loan approved pending drawdown. The statistic given is based on % of the entire CBC Kedah/Perlis performance to date.

3. Assist, maintain and improve Alor Setar Commercial Center as I can devote 100% of my time in Alor Setar as compared to current job function which require 50%/50% time allocation.

4. Alor Setar Commercial Center is currently having 121 cutomers with total loan asset of RM 143m (bigger than T'gganu-RM 90m only), ZERO Fresh NPL, manageable DEL account whereas Sg Petani have 130 accounts with total loan asset of 169m but more officers compared to Alor Setar

5. New ACM who need to travel from Penang will have more time to clean up, focus and rebuild Sg Petani Commercial to a greather height. FYI, Maybank have 1 Business Center in Sg Petani and 1 in Alor Setar.

6. Please give me a chance and review Alor Setar performance by end of the year and if my performance is still not up to Managment expectation. I'm will follow Management decision.

7. Travelling time from Alor Setar to Penang will take almost between 1 1/2 to 2 hours. Furthermore relocation of the whole familify/my kids can only be done once year end school holiday completed. If you have a stable family, insyallah you will be able to devote, concentrate and be more productive.

[54] The claimant did not receive any response to his email to Shazli. He then sent an email dated 12 May 2012 to Engku Mohamad Fauzan Engku Muhsein (Deputy Head of Commercial Banking) where he stated the following:

I believe the whole exercise has been planned and Audit Report was used as one of the tool to dispose me. Rationales are the following:

1. *24/04/2012* — Attended briefing by Transaction Banking Lucas at Menara BHL together with my CBC staff was informed by my staff inside Audiotorium (as the same was communocated [sic] by BC Perak RM to them) that Michael is coming to take over CBC Kedah/Perlis effective 15/5/2012. CBC Perak has been hearing the news from Michael for the past 2 weeks prior to this briefing. I was shoched to hear this as nothing has been communicated to me by Damian. Immediately seek

clarifaction [sic] from him and was asked to see him after briefing.

Reasons given to me was because *AUDIT Rating*. Rationale why I was the last person to know this arrangement is simply because he needs to get everybody consent before communicated the same to me (not acceptable at all). He was also quoting 'I'm not a racist ya BUT we need Chinese ACM in Sg Petani as customers is mostly CHINESE'.

Decision reached between Damian, Michael and myself that I'll be going to Alor Setar Center, customers from Alor Setar currently managed from Sg Petani office will be transferred back to Alor Setar and I hv the right to pick up RM to be transferred to Alor Setar.

4/05/2012 — Received a call from DAMIAN informing me that I'll be going to Menara BHL to be under Special Acquisiton Team(SAT) and report directly to SKW effective 1/6/2012.

7/5/2012 — Meeting with Damain and asking him the actual reason why I'll be going to SAT instead of heading Alor Setar Business Center as planned. Same reasons was given. They need new leadership and Management is not happy with CBC Kedah Audit rating Informed him that I'm not happy as I believe this arrangment [sic] is nothing to do with Audit rating. Showed CBC KPI and Performance up to 31/3/2012 xplain to him that out of 15 RAF 8 is collective signed by ABM/CCM and 5 RAF signed by BCA/BAO/CCM.

I questioned him why no action was taken against CCM who collectively and jointly signed all CA, CCM also committed breach of BAFIA.

10/5/2012 — Meeting with SKW at Menara BHL. Agains the issue of transfer is something to to [sic] with AUDIT Rating and nothing else. Appeal to him to be ACM for Alorr [sic] Setar Commercial Center but flatly refused even though Alor Setar was in his agenda to be opened as a full fledge Commercial Center in 2012, Another suggestion given to him is to be SAT and stationed in Alor Setar for 1st 6 months.

I also questioned him why no action was taken against CCM who collectively and jointly signed all CA and furthermore CCWI also committed breach of BAFTA According to him the issues will dealt separately.

He promised to look after my request and come back to me on Monday 14/5/2012.

11/5/2012 — Received HRD letter and the same was posted to Sg Petani Office.

11/5/2012 — Received a call from RD Mohd Azrul as he was in Ipoh attending function attended by RENZO/DSNR. He heard a lots of negativity about me especially ramour [sic] and allegation that I was 'on take'. Completely different version compared from what Damain and SKW communicated to me earlier. *Asked him to defend me and tell the truth. He will only do so IF someone from Commercial Banking asked him about the allegation.*

Azrul was the key principal and witness as the sender of the poison letter (dtd 30/9/2010) has confessed and apologised to him/myself verbally that all allegation was baseless and unfounded, I also have an officially documents ie, police report/letter to HRD/letter from my lawyer/statutory declaration withness [sic], by Commissioner of Oath @ our panel of solicitors denying all the allegation thrown at me.

As a Moslem, I sincerely need to clear my name and maruah. Please give me a chance to clear my name from *baseless allegation and unjust done to me. Everybody at CBC Sg Petani knows who is the culprit who has been feeding wrong @ negative information to Damian/Ganga/Venkat/SKW/Shaz.*

I WILL CONTINUE TO FIGHT FOR MY INNOCENCE and UNJUST DONE TO ME ... Pl pl assist me, Fauzan. (Emphasis added.)

[55] On 18 May 2012, the claimant wrote to Ramlah Bachik ('Ramlah') who was the Assistant General Manager (HR Relationship Manager, Group Human Resources). In that email he stated:

Refer to your letter dated 8/5/2012 which I received on 13/5/2012 where the bank has decided to transfer and redesignated me at Special Acquisition Team (Penang) unit as a Team Leader — at Level 3. Menara BHL effective 1/6/2012.

I was shocked, saddened, disappointed and feel humiliated over the event that has taken place over the past 2 weeks. Whilst I understand that the transfer of employees was a management prerogative, but such prerogative is not absolute, unfettered and cannot be exercise unreasonably and arbitrarily to the detriment of employee. Under that score, I am not prepared to accept new terms and services which is a loss to me.

1. I have been with CIMB for more than 22 years I joined the bank in 1990 as an Executive Officer and was promoted to Branch Manager position from 1997–2001, Hub Manager from 20012003 Area Sales Manager Kedah/Perlis from 2003–Dec 2005 and Area Business Manager Kedah/Perlis from 2006-2012. I have put in all my heart and souls in the company perform satisfactorily and produce excellence disciplinary records.

My overall KPI from 2004 was 3.9, 3.8 (2005), 3.5 (2006), 3,8 (2007) 3.2 (2008) 2.9 (2009) and 3.3 (2010) in term of CBC Kedah/Perlis KPI as at 31/3/2012, we are rank no 4 and doing reasonable well compared to the other 4 CBCs in Northern region.

...

In the interest of fairness social justice, compassionate and and [sic] humanitarian ground, feel *there will be a reduction in status, rank, benefit, authority and the bank has deprived me of vital duties. Now I am being relegated to a lesser importance position and responsibilities.*

Even though there was neither reduction in salary nor a change in job grade my monthly allowance of RM750 and car related benefits has been taken away from me. This will reflect on my status and loss of estimation among fellow employees

2. In addition to the above, it was observed that redesignation involves significant geographic relocation where the new office is located almost 150km from Alor Setar Commercial Center (my place of resident). Furthermore relocation of my family cannot be done immediately.

I am also require to to [sic] travel more than 300km daily and one way journey will take between 1 1/2 to 2 hrs to reach proposed new office. In addition to that I have to pay daily toll charges of RM31 with daily fuel consumption estimated to be more than RM50.

Furthermore in this inferior position. I am required to work alone and there is no longer any Relationship Manager/Deputy Manager/clerical staffs or PA reporting to me.

3. Lastly, I do not wish to accept the new terms and conditions as stated in your letter dated 8/5/2012 addressed to me. Please let me remain as a ACM at either Sg Petani Commercial Center or Alor Setar Business Center with same allowance and current car benefits Alor Setar Business Desk has been identified as among 5 Commercial Center to be opened in 2012 based on Commercial Banking Management plan presented to us during CIMB Commercial Banking Annual Management Dialogue on 14–15 Feb 2012 at Palm Garden Resort, Bangi.

Please consider my humbly request. *Your instruction is not a transfer but merely demotion in nature which will suppress my progress in my career, I wish to continue to remain in the same position with all benefits and allowances intact.*

I sincerely do believe that the matter can be resolved amicably and looking forward to hearing from HRD very soon. (Emphasis added.)

[56] On 1 June 2012, the claimant wrote to Shazli and stated the following:

Ref: Transfer and Re-designation

Thank you very much for giving an opportunity to see and discuss with you on the above issue yesterday. I am honesty feel that it was a fruitful, sincere and transparent discussion. Your vision, objective and direction of Commercial Banking especially on Special Acquisition Team unit was clearly demonstrated during our discussion. I strongly believe that if it was properly implemented by respective officers, it will certainly produce a desired result.

To recap of our discussion yesterday, attached herewith relevant documents for your information and further action

1. Copy of Letter to HRD requesting to remain as Area Commercial Manager at Alor Setar Business Center with benefits remain intact
2. My KPI from 2004 to 2011
3. Job Functions Between Sales (previously report to CSD under Dato Sulaiman) and Credit (previously report to Business banking under P Manoharan)
4. Summaries of Audit Finding in accordance to Sales (ABM) and Credit (CCM) job functions
5. Current Performance of 4 ACMs under Damian Oh-Head, Northern Region

Please consider my humbly request favourably to remain as a Area Commercial Manager at Alor Setar Commercial Center intact. My staffs and myself is fired up

and very determined to compete competitively with Sg Petani Commercial Center and continue to remain the leader among 4 Commercial Center in Nothern Region area

[57] On 18 June 2012 at 11.48am, one Rizal Edi Effendi Sahbudin ('Rizal') sent an email to the claimant stating:

Enclosed in (sic) the KPI for SAT (both Manager and RM) for your inward action. I'll talk to SKW on the measurement/Target as per our telecon just now and revert to you the soonest. You may key in the KPI part into the HRIS first and leave the Target bit for the moment.

[58] On the same day at 2.26pm, Rizal sent another email to the claimant (copied to Seng) which reads as follows:

I've checked with SKW on the target. There is a small error made by me in the enclosure ie on the Target. The KPI 'New Business Fiancing(s/c)/Loan Approved & Accepted (LAA)', is to be defined as New Business Approved and Accepted (LAA) brought in by Self and Team Members. *Each person including the Manager are expected to bring in RM xx Millions of LAA where 'xx' maybe different between regions. As the case in HQ, the SAT Managers are also expected to solicit underwrite (write paper), obtain approval (from the appropriate lending Authorities) and initiate the Loan Documentation in coliaboration with CAC. I've made the amendments in the KPI worksheet (enclosed) to reflect Northern region SAT KPI for your reference.*

As for the Contribution Target, I will furnish it separately to you as I need to work with CB Finance to calculate the reasonable Contribution numbers given the Target of Loan growth expectation. If you need further clarification, do call me anytime.

REE

p/s the target numbers in the table underneath are annualised. Your individual targets would be sensitised against the actual number of months.

(Emphasis added.)

[59] Rizal did not testify at the Industrial Court.

[60] On 14 June 2012 the claimant sent an email to Shazli, this reads as follows:

Assalamualaikum En Shazli,

Further to my email dated 11/5/12, our discussion at your office on 30/05/2012 and my letter dated 1/6/2012, I really do appreciate of your early feedbacks on the following issues during these 3 occasion:

1. Request to remain as ACM at Alor Setar Commercial Center.
2. Request to maintain current monthly allowance of RM750, car and its related benefit as well as other ACM benefits.
3. Other matters highlighted

I would also like to throw a challenge to Damian (on 24/4/12, he agreed that I took over Alor Setar Center)/Seng Kok Wing that since both of them are strongly believe that Chinese ACM at Sg Petani can do better than Malay ACM, please allow myself to compete against Michael and his DACM for the benefit of bank as a whole.

[61] On 25 June 2012 the claimant send the following email to Shazli:

My email dated 11/5/2012, our discussion at your office on 30/05/12, my letter dated 1/6/2012 and email dated 14/6/12 refers.

Despite numerous great efforts on my part to remedy the breaches with CIMB Management for the past more 1 month, regret to note that all my efforts to seek explanation in writing on several issues raised proved to be futile.

As the company failed to remedy the breached of my contract of employment, I have no choice but to seek final explanation again in writing within 14 days from the date of this email failing which I have no choice but to consider myself to be constructively dismissed. An official letter to the effect will be issued after expiry date.

Once again, I do not wish to accept new terms and conditions as per transfer letter dated 8/5/2012 and wish to remain in the same position with all current benefits remain intact.

[62] On 12 July 2012, the claimant send the following email to Rizal:

I have some reservation on the new KPI and other matters. Among them are:

1) Is SAT Penang is going to get any RM/clerical/PA within the next 1 month or so?

2) How do you calculate KPI on LAA, Loan O/S and Gross Contribution if we don't have any RM as your current calculation is based on 3 RMs?

2a) how do you derive LAA and Loan O/S target as our average target per officer is higher than RM in Penang?

3) Who is going to process and review the loan application if RM is not forthcoming as expected?

4) Do SAT leader has joint approving authority as stated in CPG like ACM?

5) Can we approve singly, BG secured against FD/FRIA-i/GIA-i up to RM200k like ACM?

6) Can SAT Leader approved Non Capex & Non Mandatory CAP EX either Recurring (up to RM5k) or Non-Recurring expenses (up to RM1k)?

7) Can SAT Leader jointly approved BPL up to RM3IVI if no variation to the current product packages?

8) When can we get KPI for Gross Contribution?

Hope to get clarification from you soon.

THE CLAIMANT WALKS OUT

[63] On 18 July 2012, the claimant send a lengthy letter to Ramlah. The relevant parts read as follows:

...

2. I strongly believe that the above action by the representative of company has damaged the relationship of confidence and trust between the bank and myself.

...

Despite various correspondences via email/letters to Head Of Commercial Banking En Ahmad Shazli, *CIMB management choose to ignore, remain silence and failed to respond to any of my letters and emails on various mentioned dates.*

I am deeply saddened, disappointed and feel humiliated over treatment received despite putting all my heart and souls with BOC/BCB/CiMB for more than 22 years. I have performed satisfactorily and produce excellent disciplinary records over the years.

5. Your instruction is not a transfer but indeed the so called redesignation is a demotion in nature wherein essential terms and benefits previously accorded to me have been withdrawn arbitrary or will be eventually withdrawn. This amounts to a fundamental breach of my contract of employment. To illustrate my points, below are some are the points for thought:

No	Benefits	SAT — Leader	ACM
1.	Monthly Allowances — RM750	No	Yes
2.	Car up to RM 70K	No	Yes
3.	Petrol Card usage up to RM 250	No	Yes
4.	Yearly Car Maintenance up to RM7K	No	Yes

6. *I am also relegated to a lesser important position compared to previous Commercial Manager job functions. My new job functions are reduction in status, diminution in power and authority*

No	Benefits	SAT — Leader	ACM
1.	2 signatories — Fully secured up to RM5m against Cash/FD/lnvestment Account	No	Yes
2.	2 Signatories — Stand alone BG/BG-I on Demand Fully Secured against FD/FRIA-I/GIA-I above RM200K to RM1m	No	Yes
3.	One signatory — Stand alone BG/BG-I on Deman Fully Secured against FD/FRIA-i/GIA-1 up to RM200K	No	Yes
4.	2 signatories — For AA up to RM2M	No	Yes
5.	2 signatories — For AA above RM2m to RM10m	No	Yes

No	Benefits	SAT — Leader	ACM
6.	2 signatories — Renewal & Amendment up [sic] to RM10m	No	Yes
7.	2 signatories — Up to RM3m on BPL	No	Yes
8.	Non Capex — Recurring	No	Yes
9.	Non Capex — Non Recurring	No	Yes

All except for item No 3 is co-signatories

7. *In this demoted position, despite my title as Team Leader, I'm require to work alone without any team members, I no longer have a specific room(only cubicle as per confirmation with Damian PA) given to me with no officer, Clerical staffs, PA reporting directly to me Among jobs function of SAT if we were to compared with ACM are as follows*:

No		SAT — Leader	ACM — Kedah/Perlis
1.	Num of Officer	0	10
2.	Number of Staffs	0	20
3.	Solicit/Marketing	Yes	Yes
4.	Process Loan*	Yes	No
5.	Recommend For Approval	Yes	Yes
6.	Initiate Loan Document*	Yes	No
7.	New Business	Yes	Yes
8.	Existing Business	No	Yes

I'm require to do officer jobs function on item No 2 & 4 which is the most crucial parts of SAT job functions. As a Team Leader, I have to key in all the necessary information in BCS system, write loan paper and initiate loan documents.

All these functions was previously undertaken by my x officers at Kedah/Perlis Area Commercial Center.

8. *The bank claims, my transfer is a lateral transfer but in actual effect, I am undertaking the job functions and roles of an officer and not a Manager.*

9. To further rub salt to the wound *I was given an unrealistic 2012 KPI with only six more months to go with no staff to assist and at the same time is expected to undertake the functions of an officer via your internal email dated 18/6/2012.*

The purported redesignation to SAT as stated in your letter dated 8/5/2012 is nothing but a series of actions to legitimise what in effect a demotion with an ulterior motive to drive me out of my employment. Among SAT main KPIs which significantly contributed to almost 50% of total score are items No 1 and No 2

No		SAT — Leader	ACM-Kedah
	No of Sales Officer	0	9
	KPI		
1.	Loan Approved & Accepted (LAA)	*240m	*75.19m
2.	Financing O/S	127m	37.79m

No		SAT — Leader	ACM-Kedah
3.	Value of Fresh Transfer	0	5.11m
4.	% of RM meeting target	75%	100%
5.	Gross Contribution	Still unavailable	15.12m

*Based on 3 team members and sensitised against the actual number of months

**NO KPI for ACM for 2012. For comparison purpose, we take 2011 ACM KPI for LAA

It is very important to have sufficient number of officer in order to perform our jobs and deliver performance within management expectation. Items No 1 & 2 will subsequently determine the fate of KPI score of items No 3, 4, 5

10. To further substantiated my point, I append herewith 2012 KPI for Financing Outstanding among 4 Commercial Center In Northern Region

No	Commercial Center	*Num of Sales Officers	Target	Ave Per RM
1	SAT	0	127m	
2	Menara BHL	12	80.29m	6.69m
3	Penang	7	66.12m	9.445m
4	Kedah	9	37.79m	3.779m
5	Perak	6	51.95m	8.65m

*Staff number as at 30/4/2012

As you can clearly see from the above statistic, SAT target given to me doesn't correspond with other Commercial Center in Northern Region To make the matter worse no consideration is given at all as I don't even have any staff at the point of KPI being delivered to me on 18/5/12 Based on the above statistic, how do you expect SAT to performance?

11. To further substantiated that there is an element of mala fide with unrealistic target, I append herewith LAA achievement of 4 Commercial Center as at March 2012.

		Average 3 months Target — LAA		# Of Office
A	SAT	60m	0	0
	Comm. Center	YTD up to March — LAA	#of Loans Submitted	#of Officer
1	Menara BHL	25.64m	20	12
2	Penang	33.12m	8	7
3	Perak	36,5m	12	6
4	Kedah/Perlis	9.5m	17	9

The above figures was extracted from VP Damian report during ACM meeting on 9/4/12.

Based on the above statistic, it is worthy to note that despite having 19 officers for the entire State of Penang state from Jan-March 2012, average loan submitted per officer per month is only 1 Furthermore, average loan approved and accepted (LAA)

per month per officer is around RM1m ONLY How do you expected SAT to perform comparatively when SAT unit doesn't even have any officer around?

...

12. I have been at SAT unit since 1 June 2012 (temporary based in Alor Setar) and up until the date of this letter, nothing has *been communicated to me either verbally or in writing that I'll be getting a staffs to assist me in my daily works. Furthermore, I also do not have any business card, bank letter head, rubber stamps and other relevant documents for SAT requirement. Email to this effect was sent on 10/7/12 and 12/7/12 respectively.*

I found it is almost impossible to work with this kind of restriction. How do you expected me to perform better than the others commercial center who are are [sic] fully equip with necessary infra/equipments/staffs but yet their target is very much lower than me.

[64] At para [16] of his letter to Ramlah, the claimant said that since the bank had not replied to or rebutted his assertions per his emails from 11 May to 25 June 2012, his complaints relating to the alleged fundamental breach of the essential terms of his contract of employment have therefore been established.

[65] Paragraph 16 of his email reads as follows:

16. I have highlighted some of the above issues in my email dated from 11/5/12 to 25/6/12 but the bank has chosen not to reply and rebut the said email thereby confirming my view that the banks actions amount to a fundamental breach of my essential terms of employment.

[66] The claimant ended his email by asserting that the he had been constructively dismissed. The email reads as follows:

I strongly believe that all the above actions that have been taken by the bank are a breach of the essential and/or fundamental terms of my contract of employment Further, I have suffered continuous humiliation, mental and emotional stress due to your action.

The bank has also not taken any corrective action nor replied to my email dated 25/6/2012 wherein I have asked the bank to rectify the breaches. In view of your above action, I am left with no other alternative but to conclude that you have no intention to retain me in service or to provide a position and job befitting my position.

Further, that you have behaved in a manner which is intended to drive me out of my position. *In light of this, I have no alternative but to consider myself to be constructively dismissed with immediate effect and I reserve my right to proceed to seek legal redress.*

[67] The bank responded to the claimant's email dated 18 July 2012 via letter dated 20 July 2012 where they stated the following:

Re: Allegation of Constructive Dismissal

We refer to your email dated 18 July 2012 which contained two unsigned letters, both of which were dated 18 July 2012. A

One letter contained allegations that the Bank, stemming from a letter of transfer dated 8 May 2012 had. In essence, breached fundamental terms of your employment contract. You alleged that as a result of which, you were now claiming constructive dismissal and leaving employment with immediate effect. B

At the outset the Bank denies that you had been constructively dismissed. Constructive dismissal only occurs when an employer unilaterally changes the terms of employment, and such change amounts to a repudiatory breach of the contract of employment. In this situation, the Bank has clearly not breached your contract of employment at all, let alone committed a repudiatory breach. C

The Bank is surprised by such drastic action taken by you pursuant *to a transfer based purely on operational requirements and consistent with your terms and conditions of service.* With that, the Bank requires you to return to work by 27 July 2012, falling which it will have no option but to deem that you have abandoned your contract of employment. D

The Bank is also not ruling out the possibility that this claim of constructive dismissal is an afterthought which has been orchestrated to afford you a reason to leave employment in the middle of an internal audit investigation on issues surroundmg you.

In conclusion, the Bank denies your allegation that your transfer was a demotion, on terms less favourable and all other claims of bad faith. Please be informed that the Bank will not hesitate to take the appropriate measures it deems fit to protect its Interests. (Emphasis added.) E

[68] The claimant replied via letter dated 26 July 2012 to Mr Chua Kim Lin ('Chua'), Head HR Services — Group Human Resources. Chua was the bank's second witness. The letter to Chua reads as follows: F

Re: CONSTRUCTIVE DISMISSAL

I refer to your letter dated 20 July 2012 which was received by me on 23 July 2012. G

I hereby strenuously deny your allegations in your letter that the bank has not breached my contract of employment and/or committed a repudiatory breach. I wish to reiterate that my transfer and re-designated as a Team Leader at Special Acquisition Team (Penang) unit is a demotion in nature for the reasons which I have stipulated in my letter dated 18 July 2012. H

The bank should not be surprised by my claim of constructive dismissal as *I had been writing nonstop to the Bunk for clarification, all of which remained unanswered as at 18 July 2012* Further from the sequence of events as raised in my letter dated 18 July 2012, it is clear that my transfer is *not* purely based on operational requirement. I believe that *this transfer has been orchestrated in a bid to drive me out of my employment.* I

I further deny that my claim for constructive dismissal was made pursuant to an internal audit investigations on issues concerning me. I am surprised by this allegation and believe that this is in fact an afterthought by the bank to somehow

frame some false and malicious allegations against me in a bid to tarnish my good name and reputation in the banking industry.

I strongly believe that all the actions that have been taken by the bank as stipulated in my letter dated 18 July 2012 are a breach of the essential and/or fundamental terms of my contract of employment. Further, despite my many emails and memos, the bank has not taken any corrective action to rectify the breaches. In view of the above, I shall not be reporting back for work on 27 July 2012 and shall pursue this matter at the Industrial Relations Department.

[69] The bank then replied via letter dated 2 August 2012 which reads as follows:

Re: Allegation of Constructive Dismissal

We refer to your letter dated 25 July 2012.

We note your comments that the bank did not respond to your queries. Please be informed that this can never amount to a fundamental breach of an employment contract. Be that as it may, the bank takes note of your refusal to return to work despite the opportunity afforded to you to do so. The bank has no choice but to view your act as an abandonment of your contract of employment.

Pursuant to the above, you are required to reimburse the bank the amount of RM25,269,77 being short notice in lieu of your abandonment of service.

The payment is to be made to the bank latest by 23 August 2012, falling which, the bank will proceed to act accordingly.

In conclusion, the bank denies all other allegations in your letter and reserves its rights in this matter.

INDUSTRIAL COURT — THE WITNESSES

[70] In the Industrial Court, the following witnesses testified on behalf of the bank:

(a) Damian Oh Kok Huat (COW1) ('Damian')
Designation: Head, Northern Region (Commercial Banking);

(b) Chua Kim Lin (COW2) ('Chua')
Designation: Human Resources Services, Group Human Resource;

(c) Venkatesan a/l V Krishnasamy (COW3) ('Venkat')
Designation: Head, Business Support He left the bank in 2013;

(d) Seng Kok Wing (COW4) ('Seng')
Designation: At the material time, he was Head of Commercial Sales (Commercial Banking). Later he became Head, Partnership & E-Payment; and

(e) Ahmad Shazli bin Kamarulzaman (COW5) ('Shazli')

Designation: At the material time, the Head of Commercial Banking and later, Deputy Chief Executive Officer Group Commercial Banking.

[71] The claimant was the sole witness and testified on his own behalf.

THE AWARD

[72] The Industrial Court's reasons for dismissing the claim may be gleaned from the following paragraphs of the award:

CLAIMANT'S EVIDENCE

[14] The claimant reiterated matters that were pleaded in his statement of case. Narrowing down to the events that led to his constructive dismissal, he was made aware of rumors that Michael would be replacing him as the ACM.

He then met with Damian who informed him that his transfer was due to the need for a Chinese ACM.

He was taken aback and requested a further meeting where it was agreed between Michael, Damian and himself that he would not be transferred but would instead be allowed to manage the Alor Setar Business Centre. Despite the assurance, he was informed verbally by Damian that he would be transferred to the SAT with effect from 1 June 2012. He then held a meeting with Damian on 7 May 2012 to raise his protest but Damian could not do anything. As such, the claimant had a meeting with Seng Kok Wing who was the Head of Commercial Sales on 10 May 2012 to discuss the transfer but no resolution was reached. The next day he received the letter informing him of his transfer.

[15] The claimant immediately wrote a detailed email dated 11 May 2012 to Shazli appealing against the transfer and requested the respondent to reconsider its decision. One of the grounds advanced by the claimant in his appeal was that one of the reasons contained in his letter of transfer was: 'your audit rating is above average and the management is not happy with that'. He reasoned that there was no grounds to penalise him when the credit control manager was accountable and responsible for most of the issues raised in the audit. He was made the scapegoat whereas the credit control manager got away scot free. Shazli did not respond. Seeing this, the claimant wrote another email to Engku Mohamad Fauzan Engku Mohsein who was the Deputy Head of Commercial Banking at the material item. Again he guided Engku step by step of the events as well as adding that the respondent needed a Chinese ACM in Sungai Petani as the customers were mostly Chinese. Again, no response! He did not stop. This time he wrote to Shazli's secretary to arrange for a meeting with him. In the meantime, Michael had already reported for duty on 15 May 2012 even though the claimant had another two weeks to go before his deadline.

[16] The claimant then on 18 May 2012 sent an email to Ramlah Bachik; the AGM HR Relationship Manager who had issued his letter to transfer. He appealed against his transfer raising; inter alia, that the Kedah/Perlis Commercial Centre was the best performing center in the northern region and ranked fourth in the country. His transfer would therefore be a demotion and/or relegation to a lesser important position and was inferior to that of an ACM. There was silence. However, vide an

email dated 23 May 2012, he was moved to Alor Setar for three months before his transfer to SAT. He further received instructions to vacate his room in the Area Commercial Center in Sungai Petani, surrender his vehicle to the new Commercial Manager and is not to sign any loan documents.

[17] The claimant then on 3 May 2012 had a meeting with Shazli where he highlighted that his transfer was a breach of the conditions of his service and it amounted to a demotion and a relegation of his duties and responsibilities to an inferior position.

He also raised the issue of there being no rationale for saying that a Chinese ACM would do a better job than the claimant and accused the respondent to be a racist, Shazli requested for some supporting materials; to which the claimant dutifully complied with. He further inquired from Shazli if he could be allowed to take over the ACM post to prove that the claimant as a Malay could do better and prove Damian and Michael wrong. Further emails were sent but went unanswered.

[18] The claimant deposed that he was then handed his Key Performance Indicators (KPI) for his position at the SAT on 18 June 2012 and was shocked to find it unrealistic. It was structured in an unrealistic and unattainable way to ensure the claimant would fail. Amongst the complaints were that the requirement for the claimant to achieve 'Loan Approved and Accepted' to be RM240m in SAT as compared to RM75.19m in ACM.

[19] It was also the evidence of the claimant that his transfer was a lateral transfer and a demotion as he had no team to assist him. He had to work alone unlike his previous position. Neither did the respondent provide him any tools to carry out his functions like business cards, stationery, etc. He also drew comparison with other centres eg Menara BHL which had 12 Sales Officers and were given a target of RM80.29m to achieve as compared to SAT with no officers and a target of RM127m.

[20] The claimant testified that despite all the difficulties, he chose to tolerate the situation in the hope that matters would be resolved by his superiors. However, he was unable to tolerate the situation any longer due to the respondents' deliberate act of refusing to reply to his appeal.

As such he wrote to the respondent on 18 July 2012 clearly stating the situation and that he had considered himself as dismissed with immediate effect. He was forced to do so due to the conduct of his employer.

[21] Under cross-examination, the claimant agreed that with the transfer, his grade would remain the same ie G38 with no reduction in salary. He also replied in affirmative when asked if the allowance would be discontinued upon him no longer undertaking the functions as ACM and that they were personal to holder. To another question, the claimant agreed that his KPI in SAT Penang was lower when compared to the one in KL.

RESPONDENTS' EVIDENCE

[22] Damian Oh Kok Huat (COW1) at the material time was the Head of Commercial Banking for the Northern Region. He testified that the claimant reported directly to him. The witness denied that the transfer of the claimant was because of the respondent wanting a Chinese ACM. He was never involved in the

decision making and that the transfer was based on the respondent's requirement. The witness further denied having mentioned anything about 'an above average credit rating' to the claimant. He however recalled that during a meeting between the claimant, Michael and himself, the claimant had appealed not to be transferred and that he had told him that he had no control or authority over his transfer and the final decision laid with the bank.

[23] Chua Kim Lin (COW2) was the Head HR Services, and Group Human Resources at the material time. It was his testimony that the claimant was issued letters in the months of March of 2010, 2011 and 2012 respectively informing him of his performances for the preceding years that did not meet with the expectations of the respondent.

[24] It was further his testimony that the letter of transfer dated 8 May 2012 was issued to the claimant informing him of his impending transfer to SAT effective 1 June 2012. The claimant assumed the position at SAT without protest on the stipulated date.

About 1 1/2 months into his new posting, the claimant sent a latter making various allegations of demotion/mala fide/victimisation and considered himself to be constructively dismissed.

The respondent had replied his letter instructing him to return to work by 27 May 2012 failing which he would be deemed to have abandoned his employment. The claimant responded on 26 May 2012 stating that he would not be reporting back to work. As such, the respondent took it that he had abandoned his job and demanded that he reimburse RM25,269.77 being short notice in lieu of his abandonment of service.

The witness also deposed that the claimant's job grade and corporate ranking remained the same after his transfer. The claimant was also not entitled to monthly allowances and car benefits received as ACM as they were job related. Under cross-examination, the witness agreed that the SAT was a new set up and that they needed people for its operations. In reply to a question, the witness replied that the bank had addressed all the allegations in the six letters written by the claimant by their letter of 20 July 2012.

[25] Ventkatatesan Krishnasamy (COW3) deposed that as Head of Business Support at the material time, he had sent an email dated 23 May 2012 allowing the claimant's request to remain in Afor Setar for three months.

It was also his testimony that the claimant did not object to the job description as Leader of SAT when it was sent to him on 28 May 2012. The claimant had on 10 July 2012 sent an email requesting for office supplies for the SAT unit. At them material time, the SAT team was not fully set up before providing the requested items. Furthermore the claimant was temporarily located in Alor Setar at the time of his request.

[26] As Head of Commercial Sales, Commercial Banking, Seng Kok Wing (COW4) testified that the claimant reported to him upon his transfer Although based in Alor Setar temporarily, the claimant reported to him. The witness agreed that there were discussions on the 7 and 10 of May 2012 respectively to discuss the transfer. The claimant would have been aware, deposed the witness, of the Penang SAT as the former had attended a presentation of the same during a town hall

meeting on 15 February 2012, Meetings were also held to brief the claimant of his new duties. According to the witness, the claimant did not protest his transfer. However he did ask if he could be retained in his old position; to which the witness explained that due to the respondents' business and operational needs, his services was required. The claimant had also approached the witness to remain in Alor Setar for three months as he needed time to locate a new school for his children and to find suitable accommodation. The respondent allowed his request and he assumed office on 1 June 2012 without any protest. The witness did not receive any complaints from the claimant since reporting and he was surprised that he had walked out of his job. *The witness also testified that it was not reasonable to hire dedicated staff as the claimant had yet to report in Penang. There were already supporting staff available. The witness also recalled giving the claimant a free hand to recruit new team members to assist him.*

The KPIs given to the claimant was also similar to that of existing SAT in Kuala Lumpur. *The KPIs for SAT leader, explained the witness, was higher that ACMs as it had less administrative work. The SAT and ACM are not the same.*

[27] Last to testify was Ahmad Shazli bin Kamarulzaman (COW5); the Head of Commercial Banking at the material time. The witness deposed that he did receive the emails sent by the claimant to him *but did not answer them as he did not want to jeopardise matters that were dealt by Human Resources, There were allegations of non-compliance on him as the ACIM and he allowed investigations to be carried out as he wanted to give him the benefit of doubt.*

The claimant had difficulty managing a centre but had an aptitude for sales. Hence it was thought that the SAT Team Leader position would suit him.

The witness admitted that a meeting was held between him and the claimant where he had explained the mechanics of the claimant's role as Team Leader of SAT. At a meeting on 30 May 2012, the witness addressed the issues that were raised by the claimant concerning his transfer.

EVALUATION OF EVIDENCE AND FINDINGS

[28] The court finds that the letter of transfer is dated 8 May 2012 and it was to take effect on 1 June 2012. The claimant duly reported at his new position; albeit given permission to remain in Alor Setar for three months by the respondent. Subsequently, the claimant claimed that he was constructively dismissed on 18 July 2012. The vourt is unable find any evidence of the claimant having taken up his new position under protest. Further, upon his reporting to the new position, the claimant makes an appeal to remain at his former position. *He had also made inquiries on his KPIs vide an email dated 25 June 2012,* the claimant threatens to be constructively dismissed if his grievances were not addressed within 14 days. However he continued to work despite the deadline lapsing. Thereafter vide an email dated 10 July 2012, he requests for stationary for SAT.

Some two days later on 12 July 2012, he seeks clarifications from Rizal Edi Effendi on work related matters at the SAT.

NO FUNDAMENTAL BREACH OF CONTRACT OF EMPLOYMENT PROVEN

[29] The court is unable to find any evidence that the respondent had breached any of the terms of employment. It is not disputed by the claimant that his grade and corporate ranking remained the same with the transfer. Neither did he prove that the *position of SAT Team Leader was much inferior to that of the ACM.* Taken cumulatively, the court is unable to find any evidence of the respondent evincing any intention to breach any terms of the contract of employment with the claimant.

RIGHT TO TRANSFER

[30] The court also finds that the transfer of the claimant was based on the needs of the business. A transfer of an employee is a managerial prerogative as was held in the cases of *Ladang Holyrood v Ayasamy Manikam & Ors* [2004] 3 MLJ 339; [2004] 2 CLJ 697, *Ikeda IOM Holdings (M) Sdn Bhd v Gan Poh Jin* [1995] 1 ILR 297 and *Saiful Bahari Abdul Rashid v Menara Kuala Lumpur Sdn Bhd* [2012] 2 LNS 324.

The court is mindful that although it is a managerial prerogative, it must be exercised in good faith. The court is unable to find any acts of mala fide in transferring him. The fact that the *claimant had repeatedly appealed against his transfer rather than protesting negates any notion of bad faith.*

ACQUIESCENCE AND INORDINATE DELAY

[31] It is the court's finding *that the claimant had acquiesced to his new post without any complaint.* His complaint was only to that of the post of ACM, After having reported to his new post, he had threatened constructive dismissal but failed to make good his threats. The claimant carried on with his job and by his conduct had acquiesced to the transfer In *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633; [1993] 4 CLJ 476 albeit not a decision relating to industrial law, the High Court ruled as follows:

> Waiver is the abandonment of a right and is either express or implied, it may be implied from conduct which is inconsistent with the construction of the right. Acquiescence implies that a person abstains from interfering while a violation of his rights is in progress.

[32] The court further finds that there was an inordinate delay in him considering himself to be constructively dismissed. His queries on the dynamics of the SAT post-reporting negates any notion of being dismissed. In *Bayer (M) Sdn Bhd v Anwar bin Abd Rahim* [1995] MLJU 558; [1996] 2 CLJ 49, the High Court at p 52 had this to say:

> In my judgment, in order to succeed in a claim for constructive dismissal, the employee must prove to the satisfaction of the court that the employer is guilty of a breach which goes to the root of the contract or if the employer has evinced an intention no longer to be bound by it. It is only in such a situation that the employee is entitled to regard the contract as terminated and treat himself as being dismissed. Constructive dismissal does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed if it were so, it is dangerous and can lead to abuse and unsettled industrial relations. Thus, it is settled law that the test applicable in a constructive dismissal case is 'the contract test' and not 'the test of reasonableness'.

To claim constructive dismissal, four conditions must be fulfilled. These conditions are:

(a) there must be a breach of contract by the employer;

(b) the breach must be sufficiently important to justify the employee resigning;

(c) the employee must leave in response to the breach and not for any other unconnected reasons; and

(d) he must not occasion any undue delay in terminating the contract, otherwise he will be deemed to have waived the breach and agreed to vary the contract.

NO EVIDENCE OF MALA FIDE

[33] The claimant had pleaded that his transfer was done in bad faith. The claimant bear the burden of proving bad faith. The court is unable to find elements of bad faith being exercised in the transfer. The Industrial Court in *Ikeda IOM Holdings (M) Sdn Bhd v Gan Poh Jin* [1995] 1 ILR 297 opined as follows:

> Where an employer has the right, expressed or implied, to transfer an employee, a refusal to obey an order of transfer by the latter would only be justified if he can show that the former's exercise of its prerogative was unreasonable or actuated by mala fide and not for genuine business considerations or exigencies. Where there is evidence of arbitrariness, victimisation or unfair labour practice, a transfer order may be held to be invalid. The onus of showing such vitiating factors lies upon the employee. In *Yong Yoke Sing & Ors v Sungei Way Estate* [1965] 2 MLJ 229; [1965] 1 LNS 209 Ong J (as he then was) held:
>
> > The appellants on the evidence have failed to discharge the onus of proving that the order was unreasonable or given mala fide in the result the labour commissioner had come to a right decision and I would dismiss the appeal.
>
> Malhotra in *The Law of Industrial Disputes* at p 238 put the matter as follows:
>
> > The charge of mala fide, whether by way of victimisation or otherwise has necessarily to be examined by the Tribunal for the purpose of finding out whether the transfer is properly made or not. Prima Facie, therefore, an order of transfer is valid unless it is shown that it was mala fide or was a measure of victimisation or unfair labour practice.
> >
> > (The) Burden of proof lies on the workman to show that the order of transfer was mala fide or was a measure of victimisation or unfair labour practice. The finding of mala fides has to be reached by the Industrial Tribunal only after sufficient reliable evidence is led in support of it. Such a finding should not be made light heartedty in a casual manner or flimsy grounds or capriciously. The finding of victimisation or male fides based on no evidence must be held to be perverse and vitiated in law.

THE CONCLUDING RULING

[34] In the final analysis, taking the evidence as a whole and mindful of s 30(5)

of the Industrial Relations Act 1967 which requires this court to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form, it is the ruling of this court that the claimant had failed on a balance of probabilities that he was constructively dismissed. It is the finding of this court that the claimant had walked out of his job subsequent to his reporting at his new position. The claim by the claimant therefore does not warrant the interference of this court.

FINAL ORDER

The claim by the claimant pursuant to this reference is hereby dismissed.

HIGH COURT — JUDICIAL REVIEW

[73] The High Court concluded that the award was vitiated by errors of law. According to the learned judicial commissioner, the award was tainted with procedural impropriety, illegality and irrationality. The learned judicial commissioner concluded that the Industrial Court failed to consider the relevant and material facts and evidence in arriving at the award and that the award is one which any similarly circumstanced tribunal would not have reached as it was not premised on facts that were pleaded and evidence adduced it. The High Court's reasons for quashing the award may be gleaned from the following parts of the grounds of judgment:

FINDINGS

[47] The applicant's grounds in this application are summarised, as follows:

(a) the second respondent erred in failing to hold that the transfer was not effected for business purposes, and/or had erred in finding 'no evidence of mala fides' in the decision to transfer the applicant;

(b) the second respondent erred in holding that the applicant had effectively acquiesced and/or had failed to object to the transfer; and

(c) the second respondent failed to discharge its duties and/or otherwise erred in reaching its decision that the applicant was not constructively dismissed.

Was the transfer not effected for business purposes, and/or is there evidence of mala fides in the decision to transfer

[48] From the totality of the evidence adduced before the second respondent, I find that the applicant has proven on a balance of probabilities that the first respondent had acted in bad faith and/or acted mala fide in transferring the applicant to an inferior position and/or demoted from the position of ACM to Team Leader SAT Unit, imposed impossible and unrealistic KPIs, not providing support staff, assigning duties and responsibilities of an officer to the applicant who held the position of a manager and withdrawing existing benefits.

[49] Although it is trite that an employer enjoys an implied right to transfer its staff, any such transfer must be bona fide, which is certainly not the case in this instance.

Thus, I am unable to agree with the submissions of the learned counsel for the first respondent that the purpose of the applicant's transfer was predicated on business requirements.

[50] In *Anwar bin Abdul Rahim v Bayer (M) Sdn Bhd* [1998] 2 MLJ 599; [1998] 2 CLJ 197, in delivering the judgment of the Court of Appeal, Mahadev Shankar JCA, held:

> It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonableness test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract'.
>
> (See *Holiday Inn Kuching v Elizabeh Lee Chai Siok* [1992] 1 CLJ 141 (cit) and *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 at p 94. (Emphasis added.)

[51] In applying the test laid down in *Anwar Abdul Rahim*, I find the actions of the first respondent clearly amounted to a fundamental breach of the applicant's contract of employment and a breach of express and implied terms and conditions of employment.

[52] Further, in doing so, *the first respondent demolished the relationship of mutual trust and confidence between employer and employee, which left the applicant with no alternative but to consider himself as being constructively dismissed.*

[53] The evidence before the second respondent also show that the first respondent's witnesses during the cross-examination agreed that the applicant by way of numerous emails and letters had protested against the decision to transfer him to the SAT Unit in Penang.

The first respondent's witnesses also did not dispute that the first respondent did not reply or deny the allegations raised by the applicant in his emails and letters.

[54] Thus, *the second respondent clearly erred in its finding that there was no evidence of protest by the applicant, which amount to an error of law.*

[55] I also agree with the submissions of the learned counsel for the applicant that the second respondent's decision suffers from illegality, irrationality and proportionality when the second respondent failed to take into account the relevant facts and evidence produced by the applicant that there was a reduction in the applicant's rank, status, authority and benefits,

[56] It is pertinent to note that the first respondent failed to adduce proof of any business requirement when the first respondent decided to transfer the applicant to the SAT Unit and replace the applicant with a Chinese personnel

[57] Further, in reference to the first respondent's Commercial Banking Business Plan 2012, it is apparent that the first respondent had no plan to set up a SAT Unit in Penang. The first respondent's plan was only to set up five new Business Centres, in PJ2, JB2, Alor Setar, Kluang Desk and Batu Pahat Desk,

[58] The first respondent's witnesses also confirmed in cross-examination that *the*

SAT Unit was not in existence at the time when the first respondent decided to transfer the applicant as SAT.

[59] The first respondent's witness further admitted that the applicant was not accorded with a job description as the Team Leader of SAT Unit when he was issued the letter of transfer,

[60] The evidence before the second respondent also indicate that the first respondent failed to provide the applicant with documents, letter heads, business cards, rubber stamps etc, for the applicant to effectively carry out his duties and responsibilities.

[61] It was also not disputed that the applicant by virtue of his transfer, would be losing his monthly allowance of RM750 and car related benefits.

[62] The first respondent also did not deny that the applicant was instructed to vacate his room when Micheal Ong came to report for his duty on 17 May 2012, whilst the applicant was still the ACM, The Applicant was further instructed to give his company issued car to Michael Ong and was not allowed to sign any new loan documents effective 1 June 2012.

[63] The fact that the first respondent had exercised its discretion in favour of the applicant to ease the impact of the transfer by granting his request to work from Alor Setar for the first three months, and allowing him to keep the company car for that same period, in no way alters the actual reason for the applicant's transfer

[64] In addition, *upon his transfer, the applicant was instructed to do the job of his subordinates.*

[65] Hence, I find that *albeit the terms and conditions such as remuneration and benefits remained unchanged, the same does not mean that there as been no demotion.*

[66] Thus, I am satisfied that the second respondent's finding that there is no evidence that the first respondent had breached any terms of the employment is an error of law.

[67] In light of the above, it is dear that the first respondent's contention that this ground of the applicant's challenge is to relitigate his claim, is without basis.

Did the applicant effectively acquiesced and/or failed to object to the transfer

[68] In *Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd* [2006] MLJU 219, Siti Norma Yaakob FCJ (as Her Ladyship then was), delivering the judgment of the Federal Court, stated:

> The duty of an employee at common law is also similar in that he is to comply with all lawful and reasonable orders given by his employer with respect to the performance of such functions within the scope of his employment. That duty is one of the fundamental obligations which are deemed to be impliedly undertaken in every contract of hiring. The duty of obedience at common law is subject to two qualifications, firstly that the employer may not order his employee to do something illegal or secondly order his employee to do anything dangerous.
>
> However it may well be that an employee is caught in the situation that he is required to obey an order and he is doubtful whether the order is legal or not. Under those circumstances the proper course is for the employee to obey the

> order first and to challenge its legality in separate proceedings. This distinction is made on the basis that if the law allows the employee to disobey any order he thinks is not legal, it would be impossible for the management to maintain discipline and industrial peace. On the other hand, if the employee takes upon himself to disobey the order which he thinks to be unlawful and unreasonable two courses are open to him. He can point out his difficulties, if any, to the superior and if the latter insists on the order being carried out, he can do the work and take the matter further in proceedings against his employer or to complain to his union. If he disobeys, he must take the risk if the court finds the order to be lawful and reasonable. See the case of *Pan Global Textiles Bhd, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27. (Emphasis added.)

[69] In the instant matter, *the evidence shows that the applicant decided to bear with the situation in the hope that matters would be resolved, as he had been writing to all his superiors complaining about his transfer. And, only when the applicant couid no longer tolerate the treament that he was receiving, did the applicant claim constructive dismissal*.

[70] Thus, in accordance with the decision in *Ngeow Voon Yean*, *find that the applicant did not delay in claiming constructive dismissal via his letter dated 18 July 2012.*

This is especially so since the applicant was assured by Ahmad Shazli Kamarulzaman that his protest and appeal would be considered and that first respondent would get back to him.

[71] Hence, the issue of the applicant having deemed to waive the breach (if any) and affirm the contract of employment, does not arise.

[72] Further, the period of 1.5 months between the effective date of transfer and the applicant's letter claiming constructive dismissal does not constitute an undue delay, as alleged by the first respondent.

[73] Therefore, the applicant did not acquiesce to the transfer by acting in a manner inconsistent with his alleged rights.

Was the applicant constructively dismissed

[74] In *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600 Gopal Sri Ram JCA (as His Lordship then was), defined constructive dismissal as:

> A reading of the pleaded case for the parties resolved the issue that fell for adjudication before the Industrial Court into what the profession has come to call as a 'constructive dismissal'. There is no magic in the phrase. It simply means this.
>
> An employer does not like a workman. He does not want to dismiss him and face the consequences. He wants to ease the workman out of his organisation. He wants to make the process as painless as possible for himself. He usually employs the subtlest of means. He may, under the guise of exercising the management power of transfer, demote the workman. That is what happened in *Wong Chee Hong*. Alternatively, he may take steps to reduce the workman in rank by giving him fewer or less prestigious responsibilities than previously held.
>
> Generally speaking, he will make life so unbearable for the workman so as to

drive the latter out of employment. In the normal case, the workman being unable to tolerate the acts of oppression and victimisation will tender his resignation and leave the employer's services. The question will then arise whether such departure is a voluntary resignation or a dismissal in truth and fact. (Emphasis added.)

[75] From the evidence tendered during the trial before the second respondent and for the reasons I have explained above, I find that the second respondent failed to consider the relevant and material facts and evidence in arriving at the award.

[76] Therefore, the award of the second respondent was one which any similarly circumstanced tribunal would not have reached, as it was not premised on facts that were pleaded and the evidence adduced before it,

[77] Accordingly, in light of the circumstances in which the applicant tendered his resignation, I hold that the applicant had clearly established that he was constructively dismissed.

CONCLUSION

[78] Thus, for the reasons enunciated above, I hold that the award was clearly wrong in law and tainted with procedural impropriety, illegality and irrationality.

[79] Hence, the applicant's application is allowed and the award of the second respondent is quashed as the dismissal of the applicant was without just cause and excuse.

[80] And, for expediency, instead of remitting the matter back to the second respondent for assessment, I hold that the damages that the first respondent is required to pay the applicant, are as follows: ...

OUR DECISION

[74] The concept of constructive dismissal is essentially a situation of 'deemed dismissal'. And this will arise in circumstances where the employer does not overtly dismiss the employee and says or does nothing to communicate to the employee that he is being dismissed but rather, by reason of the employer's singular or cumulative actions or conduct, the employee feels that he has been driven out of employment and therefore dismissed. It is important to emphasise that it is not every shade or facet of the employer's conduct that will give rise to constructive dismissal.

[75] In particular, it is not the employer's unreasonable conduct which is in focus, Rather, the first question is whether the employer's conduct is 'repudiatory' of the contract of employment — the 'contract test'. As such, what is in focus in this concept is the 'employer's conduct' with respect to the particular employee concerned against the backdrop of the employee's contract of employment. Where the employer's conduct is such that it constitutes a significant breach going to the root of a contract of employment and it shows that the employer no longer intends to be bound by one or more of the essential (express or implied) terms of the contract, an employee is entitled to walk out

and treat himself as discharged from any further performance of his obligations, on the ground that he has been 'constructively dismissed'.

[76] Hence, it is clear that what is in contemplation within the concept of constructive dismissal is a breach of a fundamental or essential (express or implied) term of the contract of employment. In this context, fundamental breach of contract is also regarded as 'repudiatory conduct' which goes to the root of the contract of employment.

[77] A claim of constructive dismissal can arise in a myriad of circumstances but more often than not, it seems to arise in the context of a transfer or re-designation.

[78] Thus, as with most cases of this type, this appeal involves a consideration of the inherently difficult and fact-sensitive interplay between, on the one hand, the management right or prerogative of an employer to transfer and/or to re-designate or re-deploy an employee from one position or geographical location to another position or geographical location for legitimate or bona fide business, operational or organisational reasons.

[79] And on the other hand, there is the expectation of the employee that the employer's decision will not be actuated by mala fides and/or that the employer will not issue a transfer/re-designation that will result in the employee being demoted, or punished, or victimised.

[80] Here the bank maintains that there was no demotion, no punishment, and no mala fides and that the claimant was transferred/re-designated for legitimate business or operational reasons. But in their letter dated 20 July 2012, the bank did acknowledge that the claimant was under 'investigation' but nothing was revealed at the hearing before the Industrial Court as to the scope of the so-called investigation.

[81] Indeed, the bank's revelation that the claimant was under investigation feeds the claimant's theory all along that he was being victimised for the wrongdoing of others who seem to have got off scot-free for issues relating to regulatory compliance.

[82] And now to the case at hand. It is relevant, necessary and imperative to emphasise at the outset that the role and jurisdiction of the High Court in a judicial review application is limited and is circumscribed by the principle that findings of fact are not to be interfered with unless the decision was premised on 'no evidence' or was 'irrational'.

[83] In this regard, the decision of the Court of Appeal in *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493; [2006] 3 AMR 555; [2006] 2 CLJ 501 (CA) per Mohd Ghazali Yusoff JCA is instructive as the principles relating to the High Court's supervisory jurisdiction in judicial review were summarised and conveniently stated as follows:

> [37] From the authorities discussed above, I would think that in dealing with judicial review a judge should have the following principles, inter alia, in the forefront of his mind:
>
> (a) judicial review is not an appeal from a decision but a review of the manner in which the decision was made;
>
> (b) the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable;
>
> (c) the High Court, through judicial review, should not introduce technicalities of the court of law to the Industrial Court; this would certainly be so as s 30(5) of the Act imposes a duty upon the Industrial Court to have regard to substantial merits of a case rather than to technicalities and it also requires the Industrial Court to decide a case in accordance with equity and good conscience;
>
> (d) the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act is to determine whether the misconduct or irregularities complained of by the management as to the grounds of dismissal were in fact committed by the workman and if so, whether such grounds constitute just cause or excuse for the dismissal;
>
> (e) the Industrial Court should not be burdened with the technicalities regarding standard of proof, the rules of evidence and procedure that are applied in the court of law;
>
> (f) the High Court will not interfere with finding of facts by the Industrial Court unless the same are completely unsupported by evidence and further, will not interfere merely because it may come to different conclusions on facts on the basis of the same evidence; weighing and assessing the evidence of the witnesses is the function of the Industrial Court and not that of the High Court.

[84] It is equally important to emphasis that it is well established that in judicial review proceedings, the High Court can disagree with the Industrial Court on the conclusions or inferences drawn by the Industrial Court from the evidence placed before it on the grounds that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion. This principle was stated by the Court of Appeal in *Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar Singh* [2000] 3 MLJ 714 at p 722; [2000] 1 MLRA 664 (CA) as follows:

A On the other hand, we accept, of course, that it is entirely competent for the High Court in certiorari proceedings to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the proved or admitted evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference. An erroneous inference B from proved or admitted facts is an error of taw; not an error of fact. If authority is required for that proposition it may be found in the judgment of Gill J (later CJ (Malaya)) in *Govinda Mudaliar & Sons v Govindasamy* [1967] 2 MLJ 5.

[85] In the present case, one of the claimant's complaints was that his duties C and responsibilities were diluted and that he had been relegated to doing what he had done several years earlier. Specifically, the claimant stated that by the transfer and redesignation, he was being asked to perform tasks which his subordinates did whilst he was ACM.

D **[86]** He also said that he did not have any manpower or support staff to execute the tasks as Team Leader of SAT while temporarily placed at the Alor Setar branch for three months pending his relocation to Penang, This is borne out from the following excerpts from his letter dated 18 July 2012 to Ramlah:

E In this demoted position, despite my title as Team Leader, I'm require to work alone without any team members. I no longer have a specific room (only cubicle as per confirmation with Damian PA) given to me with no officer, Clerical staffs, PA reporting directly to me.

I'm require to do officer jobs function on item No 2 & 4 which is the most crucial parts F *of SAT job functions. As a Team Leader, I have to key in all the necessary information in BCS system, write loan paper and initiate loan documents. All these functions was previously undertaken by my x officers at Kedah/Perlis Area Commercial Center.*

The Bank claims, my transfer is a lateral transfer but in actual effect, I am undertaking the job functions and roles of an officer and not a Manager.

G To further rub salt to the wound *I was given an unrealistic 2012 KPI with only six more months to go with no staff to assist and at the same time is expected to undertake the functions of an officer via your internal e mail dated 18/6/2012.* The purported redesignation to SAT as stated in your letter dated 8/5/2012 is nothing but a series of actions to legitimise what in effect a demotion with an ulterior motive to drive me H out of my employment.

[87] Seng testified that the claimant had a higher loan target as the SAT Leader had less administrative duties as compared to an ACM, But the I claimant said that the loan target was unrealistic and unachievable. The claimant referred to following Table to make the point, particularly to demonstrate that he was all alone and had no support staff to help him reach the target:

No	Commercial Center	*Num of Sales Officers	Target	Ave Per RM
1	SAT	0	127m	
2	Menara BHL	12	80.29m	6.69m
3	Penang	7	66.12m	9.445m
4	Kedah	9	37.79m	3.779m
5	Perak	6	51.95m	8.65m

*Staff number as at 30/4/2012

[88] The claimant's case was that his transfer was a lateral transfer and a demotion as he had no team to assist him. He had to work alone unlike his previous position. The bank did not provide him any tools to carry out his functions like business cards, stationery, etc. He also drew comparison with other centres eg, Menara BHL which had 12 Sales Officers and were given a target of RM80.29m to achieve as compared to SAT with no officers and a target of RM127m to be achieved within six months and without the new loans being taken by existing customers of the bank. This would mean that the claimant would have to look for new loan customers from outside the pool of existing customers ie, from ground zero.

[89] However, Seng testified that it was not reasonable to hire dedicated staff as the claimant had yet to report in Penang, He said, there were already supporting staff available. Seng also recalled giving the claimant a free hand to recruit new team members to assist him. But if one looks at the claimant's emails, it becomes clear that he was pleading for support but there was just no response from the bank to assuage him or to say that he had (as Seng purportedly put it) a 'free hand'. If indeed he had a free hand then it would have the easiest thing to just respond to the claimant's emails and to put to rest or to allay the claimant's suspicion that he was being overloaded or burdened with a loan target which was unrealistic.

[90] There was also no credible explanation from the bank's witnesses with regard to the content of Rizal's email dated 18 June 2012 (at 2.26pm) to the claimant which made it amply clear that he had to perform the tasks alone. This may be gathered from Rizal's email which reads, 'Each person including the Manager are expected to bring in RM xx Millions of LAA where 'xx' maybe different between regions. As the case in HQ, the *SAT Managers are also expected to solicit, underwrite (write paper), obtain approval (from the appropriate lending Authorities) and initiate the Loan Documentation* in collaboration with CAC'. (Emphasis added.)

[91] Thus, based on the evidence, it is clear that as SAT Leader the claimant was expected to 'to solicit, underwrite (write paper), obtain approval (from the

appropriate lending Authorities) and initiate the Loan Documentation'. According to the claimant, when he was ACIVI, these tasks were done by his subordinates and that these were tasks which he had done in his previous roles prior to becoming ACM.

[92] Hence, this is a case where the claimant was being asked to do what he used to do when he was in a position junior to the ACM's position. We shall come back to this theme shortly. We shall now examine some of the previous decided cases where similar complaints had been made by employees who claimed constructive dismissal.

[93] As a general proposition it may be said that a complaint by an employee that some of his duties and responsibilities have been taken away may not necessarily be the basis for a complaint of constructive dismissal.

[94] In *Southern Investment Bank Bhd/Southern Bank & Anor v Yap Fat & Anor* [2017] 3 MLJ 327; [2017] 8 CLJ 159; [2017] 3 MLRA 408 (CA), the Court of Appeal examined the employee's complaint of constructive dismissal pertaining to the removal of the claimant's duties and responsibilities and opined that these are an integral part of the employer's management prerogative and went on to hold that an employer can transfer or re-designate its employees based on its business needs and exigencies.

[95] Thus, ordinarily, these complaints cannot per se be relied upon as building blocks for constructive dismissal save and except where it amounts to a demotion, loss in salary and benefits and other privileges and/or actuated by discrimination or done in bad faith or by way of punishment.

[96] In this regard, the Court of Appeal said:

> REMOVAL OF THE FIRST RESPONDENT'S DUTIES AND RESPONSIBILITIES
>
> [24] The law recognises that in pursuit of its legitimate interest, the management has the prerogative to assign or transfer employees from one area of operation to another provided there is no demotion in rank or diminution of salary, benefits, and other privileges; and the action is not motivated by discrimination, made in bad faith, or effected as a form of punishment or demotion without sufficient cause. This is a privilege inherent in the employer's right to control and manage his enterprise effectively.
>
> For this reason, courts often decline to interfere in legitimate business decisions of employers. In fact, industrial relations laws discourage interference in employer's decisions concerning the conduct of their business (see *Elya Designs Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor* [2010] MLJU 2186; [2011] 3 CLJ 929 (HC)).

[25] In our view, the transfer of the 'agency' function from the first respondent's portfolio, ie, from the Capital Market Department to the Credit Administrative Department, is the prerogative of the CEO and was carried out in line with the structural revamping instructed by the new CEO, Mr Goh. These actions cannot be construed as a breach going to the root of the employment relationship between the first respondent and the appellants.

[97] At [26], the Court of Appeal took the opportunity to define 'demotion' as follows:

[26] In our view, the removal of certain duties and responsibilities from the first respondent's portfolio did not constitute a demotion on part of the first respondent. Demotion involves a situation where an employee is relegated to a subordinate or less important position constituting a deduction to a lower grade or rank, with a corresponding decrease in duties and responsibilities, and usually accompanied by a decrease in salary. It is not in dispute that the first respondent continued to enjoy his monthly salary along with other benefits accorded to him under his employment contract during the three months' notice period.

[98] In *Shahabudin Abdul Rashid v Talasco Insurance Sdn Bhd* [2004] 4 CLJ 514; [2004] 2 MLRA 165 (CA), the employee claimed constructive dismissal by relying on the cumulative conduct of his employer in demoting him and asking him to move to a smaller room. He also relied on the fact that after these two events had occurred, his former subordinates were no longer reporting to him. In addition, he also relied on three more facts, viz that *he had to perform duties previously assigned to his subordinates, that he* was not informed of the re-designation of his post and that he was also not informed of the change in the nature of his work.

[99] Hence, he claimed that his employer's cumulative conduct was not only unfair and unreasonable but that it had also amounted to a unilateral variation of the contract of employment. Therefore, he treated himself as constructively dismissed based on his employer's cumulative conduct, The Industrial Court agreed with his contention and decided in his favour His employer (Talasco) filed for judicial review in the High Court. The High Court disagreed with the Industrial Court's award. It granted an order of certiorari to quash the Industrial Court's award. Hence, the employee appealed to the Court of Appeal. The employee's appeal was dismissed by the Court of Appeal.

[100] The Court of Appeal's reasoning may be seen from the following paragraphs at pp 518–519 of the report:

The High Court disagreed with the Industrial Court as the latter had asked the wrong question for the real issue was whether there has been a change in the terms and conditions of the appellant's employment which worked to his disadvantage as a result of the re-organisation.

> We confirm this to be the true test as the employer's conduct in reorganising the business must be such as to amount to there being a breach of some term in the appellant's contract of employment and must be so fundamental as to evince an intention not to be bound by the contract of employment. Expressed in another way has there been a unilateral repudiation of the contract of employment by the respondent as to entitle the appellant to claim that he has been constructively dismissed?
>
> The test is definitely the contract test and the law on this is well settled. See the case of *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45.
>
> ...
>
> The only change perhaps was in the re-designation of his post as he was no longer known as the Chief Accountant but as Accountant (Corporate). He also had to report to a new Head his immediate superior in the newly organised department, and someone who was newly recruited.
>
> He also resented the fact that he was put in a smaller room and accumulatively he maintained that these factors amounted to a demotion. The High Court disagreed and we support that finding as these changes were administrative changes following the re-organisation and do not have the effect of breaching any term of the appellant's contract of employment-at least there was no evidence pointing to such a conclusion. His other complaints are too trivial to amount to there being any breach of any term of his contract of employment.

[101] In *Christoph Hoelzl v Langkawi Island Resort Sdn Bhd* [1998] 6 MLJ 162; [1998] 1 LNS 87; [1998] 5 MLRH 531 (HC), the High Court held, at para 168E–F, that while the claimant might have felt slighted by the new arrangement in the line of reporting to a representative of the company instead of to its chairman, which may have affected his self-esteem amongst his fellow employees, this fact alone was insufficient to make a reasonable man feel frustrated to the extent that it became impossible for him to carry on being employed by the organisation. Hence, the High Court held that the claimant was not entitled to treat himself as constructively dismissed.

[102] In *Marcus Wong v Malayan Banking Berhad* [2015] 2 LNS 245; [2015] 3 MELR 129 (IC), the Industrial Court found in favour of the employee who had claimed that he was constructively dismissed. The Industrial Court relied on the fact that the employee had ceased to enjoy benefits like exclusive office room, hand phone and an exclusive car park lot.

[103] Although the employer contended that the employee's new position is at par with his former position as business development manager, the Industrial Court opined that his new post is of lesser importance compared to his former position.

[104] The Industrial Court also placed emphasis on the fact that unlike the previous position there were no staff assisting and reporting to the employee. Thus, the Industrial Court concluded that the new position 'was one of lesser importance'.

[105] However, the award was quashed by the High Court in *Malayan Banking Berhad v Marcus Wong & Anor* [2015] MLJU 1965; [2016] 1 LNS 1712; [2015] MLRHU 1447 (HC) which concluded that the Industrial Court had fallen into error in not appreciating the fact that that the removal of the loan approving authority and the 16 staff was the result of the reorganisation of the SME Business and therefore cannot be construed as reduction of the responsibility of the employee. In that case, even the employee agreed that after re-organisation, the present SME manager has only ten staff under him as compared to 19 staff earlier.

FAILURE TO RESPOND TO EMAILS

[106] One of the claimant's complaints here was that he had sent several emails to the bank but these did not elicit any response from the bank. Chua (COW2) agreed that there was no response to the claimant's several emails.

[107] He said he had not seen these emails as they were not addressed to him. But Chua said that the bank had responded to the claimant's letter dated 18 July 2012.

[108] On the other hand, Shazli (COW5) said that he did not think that it would be proper to respond to the claimant's emails as he did not want to jeopardise the on-going investigations.

[109] In *Teng Tong Kee v Nikmat Jasa Piling Sdn Bhd* [2006] 1 CLJ 1199; [2006] 1 MLRA 70 (CA), the Court of Appeal held that the company's failure to reply to the claimant's letter of 12 May 1992 could not be taken as conclusive evidence that the claimant had been dismissed without just cause and excuse. The learned judge was right in so holding and the Industrial Court was wrong to have concluded otherwise:

> [18] Again, on the totality of the evidence in this case we find that the Industrial Court had erred in holding that the failure of the respondent to reply to the appellant's letter (CL1) was deemed as conclusive evidence that the appellant had been dismissed by the respondent without just cause.
>
> [19] The learned judge was right in holding that the failure of the respondent to reply to the said letter cannot be taken as the main evidence that the appellant was dismissed without just cause by the respondent. Evaluation of other facts such as the testimony of the respondent's witnesses had to be taken into account (see *R Rama*

Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147).

[110] In our view, the bank's failure to respond to the claimant's emails is wholly inexcusable in the circumstances. It should have been obvious to all those in management particularly those in Human Resource Management that there was a situation that was developing and this at the very least, necessitated a response.

[111] Of course, merely sending a response is insufficient. There has to be content and substance in any response. If time was insufficient, at least a 'holding letter' to inform the claimant that his complaints were being addressed Here, the bank seems to have been nonchalant and turned a blind eye to the claimant's grievances.

[112] Shazli said that he did not respond because of the ongoing investigation, of which no details were revealed to the Industrial Court. In any case, the question is — what did the so-called on-going investigation (if any) have to do with the claimant's issues with regard to the transfer and re-designation? In our view, none. This is because the one thing had nothing to do with the other.

[113] Thus, it is relevant to ask — did Shazli refer the matter to the bank's Human Resource department and make an informed decision not to respond to the claimant's several blistering emails? It is also relevant to ask if Ramlah was in the loop and whether she had made any decision on whether or not to respond to the claimant's email? The answer is obvious.

[114] There is no evidence that Shazli discussed the matter with anyone in the Human Resources Management Department, and as for Ramlah, she was certainly in the loop as the claimant sent her at least two emails with regard to his situation. But yet she did not respond and it seems very probable that she also did not instruct anyone to respond on her behalf. Ramlah did not testify and so we would not know what she would have said in response to some of the searching questions about the bank's handling of the claimant's situation.

[115] In the circumstances, we do not think that the bank can seek refuge in the decision of the Court of Appeal in *Teng Tong Kee v Nikmat Jasa Piling Sdn Bhd* [2006] 1 CLJ 1199; [2006] 1 MLRA 70 (CA) which stands for the proposition that an employer's failure to respond to an employee's letter cannot be equated with proof that the employee had been dismissed without just cause or excuse.

[116] According to that case, the entire gamut of evidence must be examined to determine whether dismissal without just cause had or had not, been proven.

The claimant here had raised several issues in his multitude of emails many of which warranted a robust response from the bank. A

[117] The bank's failure to respond in the present circumstances meant that the bank had no response and could not muster any explanation for the complaints that were raised in the claimant's emails, particularly his complaint that his transfer was a lateral transfer and a demotion as he had no team to assist him. B

[118] The bank ought to have addressed his complaint that he had to work alone unlike his previous position and that he was being asked to perform tasks which he had done in his former positions. The bank ought to have addressed the claimant's complaint regarding unrealistic targets especially when he drew comparisons with other centres eg Menara BHL which had 12 sales officers and were given a target of RM80.29m to achieve as compared to SAT with no officers and a target of RM127m to be achieved within six months (from new customers). C D

[119] In the context of the present discussion it is important for us to make it clear that a claim for constructive dismissal is not considered proven merely because of a failure by the bank's to contemporaneously respond to the claimant's emails. However, the bank's failure to respond to the claimant's letters of complaint (emails) will certainly work to the evidential advantage of the claimant. Of course, there could be situations where a response was not possible but that will depend on the particular facts and circumstances. In the present case, there is nothing which exonerates the bank from its failure to respond to the claimant's emails. E F

[120] Hence, the failure to respond to the employee's letters of complaint is just one aspect of the factual matrix which has to be considered. Ultimately, what has to be done is for the evidence as a whole to be meticulously scrutinised by the Industrial Court to determine the existence or non-existence of the conditions and pre-requisites for a claim of constructive dismissal. G

[121] As we said earlier, a claim of constructive dismissal would invariably be fact-sensitive. Thus, no two cases are exactly alike and whether an employee can succeed in establishing his claim on a balance of probabilities will depend on the particular facts and circumstances surrounding the complaint. H

[122] This case highlights the tension between the express or implied contractual right or management prerogative of an employer to transfer and re-designate an employee by reason of the employer's business or operational needs, and the right of the employee to oppose or challenge an order of transfer/re-designation which: I

A (a) is tainted with or actuated by mala fides;

(b) is a form of victimisation; and

(c) changes the remuneration, benefits, job content, job status, job duties, and/or is a demotion.

B

[123] In so far as the claimant's performance was concerned it is interesting that in para 4 of the statement of case (filed in the Industrial Court) the claimant averred that throughout his tenure with the bank he had regularly been receiving 'increments, bonuses, and incentive for his dedicated and hard C work'. But that is not exactly accurate as the claimant did not get any bonus and salary increment for 2009 and 2010 as he did not meet the bank's expectations (see: para 5 of the bank's statement in reply).

D **[124]** In fact, by letter dated 21 March 2012, the claimant was informed that he would not be receiving any bonus for 2011 due to his poor performance.

[125] It is implicit from that letter that there would be no salary increment as well. The letter signed by the Group Chief Executive reads as follows:

E *PERFORMANCE REVIEW FOR YEAR ENDED 2011*

We regret to note that *your performance in 2011 did not meet our expectations.* In view of your poor performance, please note that y*ou have not been accorded any bonus for 2011 and your basic salary remains unchanged for 2012.*

F The Group *views your unsatisfactory performance seriously* and you are required to take the necessary steps to rectify your shortcomings.

We will be reviewing your performance on regular basis and if there is no significant improvement in your performance, the Group reserves the right to take necessary disciplinary action.

G

[126] It is of course odd that the claimant whose performance for 2011 was well below the bank's expectations, was re-designated and transferred to an altogether new position in another state with effect from 1 June 2012 where he was expected to bring an enormous volume of loans from new clients.

H

[127] It may be mentioned here that Shazli (COW5) who was at that time the Head of Commercial Banking testified that the claimant was a good fit for the new position as his strength was in 'sales'. Thus, although in March 2012, the claimant was informed that his performance in 2011 was below the bank's I expectations and that he would not be receiving any performance bonus for 2011 or salary increment in 2012, the bank issued the transfer letter.

[128] The claimant said that quite apart from the other issues which he had, the transfer/re-designation was to his disadvantage as over the several years that

he was in Alor Setar/Sungei Petani, he had formed a network of customers in Kedah/Perlis whereas in Penang, he had no connections and would have to start afresh from ground zero. According to the bank (per Shazli's evidence), the SAT was essentially established to carry out a 'predatorial' function — to 'hunt' for loans from new customers.

[129] Thus, the SATs target and focus would be on high net-worth individuals, businesses, entities, organisations or bodies which/who are not existing customers of the bank. This is obviously a tall order as the SAT would virtually be starting from ground zero.

[130] The claimant asserted that it made no commercial sense to be transferred to Penang to hunt for customers to bring in new loans worth RM127m (within six months) as his customer base and network was in Kedah/Perlis.

[131] The claimant alleged that his transfer and re-designation as Team Leader of the SAT was not bona fide, that there was victimisation on the part of the bank and that he was demoted. He also alleged that he had no support staff, and was expected to personally source for loans from new (and not existing) customers (and to process the same), and was given an unrealistic and unachievable target.

[132] The claimant had documented his grievances via several emails to the bank's senior management, but these went unanswered. It is clear from a perusal of his emails that the claimant had vehemently resisted the transfer and made several written representations to the bank imploring that he should not be transferred. The claimant's emails were a manifestation of a 'protest' against the impending transfer. The claimant eventually took up the position as Team Leader of the SAT with effect from 1 June 2012.

[133] The claimant requested that he be allowed to carry out his work in Alor Setar for three months before relocating to Penang. He put forward family related reasons and asked for the three months delay in relocating to Penang. The bank granted the claimant's request. The claimant proposed or suggested to the bank's management that he should head the Business Center in Alor Setar instead of being sent to Penang as Team Leader of the SAT. The bank did not respond to the claimant's said proposal or suggestion.

[134] At any rate, during cross-examination the claimant agreed that as at 1 June 2012, he had commenced his new role as Team Leader of the SAT-By letter dated 18 July 2012, whilst he was temporarily located as Team Leader of SAT in Alor Setar, the claimant 'walked out' as he deemed himself to have been constructively dismissed. The issue before the Industrial Court was whether the

claimant had proven on a balance of probabilities that the bank had, by its conduct, evinced an intention to be no longer bound by the express and/or implied terms of the contract of employment between the bank (as employer) and claimant (as employee), such that the claimant was entitled in law, to treat himself as having been 'constructively dismissed'.

[135] The Industrial Court found that the bank did not commit any fundamental breach of contract and that there was no demotion and no evidence of mala fides on the part of the bank with regard to the transfer and re-designation as Team Leader of the SAT. But the Industrial Court glossed over the fact that the bank did not respond to the emails from the claimant and that there was just deafening silence on the part of the bank.

[136] The bank's silence is in and of itself, baffling. Having examined the matter in totality, we find that there was no credible explanation by any of the bank's witnesses as to why the bank did not respond to the several emails which were sent by the claimant.

MUTUAL TRUST AND CONFIDENCE

[137] The law on constructive dismissal is well established and the principles are quite well defined. The difficulty lies in the application of those principles in determining whether or not the employee concerned has established that he had been constructively dismissed. It is relatively easier to prove that an employer has breached the express terms of the contract of employment. The more challenging case of constructive dismissal is where the employee asserts (as the claimant has done in this case) that there has been a breach of an implied term of the contract of employment.

[138] The most usual implied term that is ventilated in constructive dismissal cases is the allegation that the employer had committed a breach of a fundamental term of the contract of employment which went to the root of the contract, namely a breach of the implied term of 'mutual trust and confidence' which is arguably the bedrock of, or which lies at the heart of the relationship between an employer and employee.

[139] In the present case the claimant accepts that the bank is entitled to re-designate him and to transfer him and that he does not have any contractual right to remain as ACM in perpetuity.

[140] The claimant's point is that by their cumulative conduct, the bank had destroyed the implied term of mutual trust and confidence. As the High Court in *Moo Ng v Kiwi Products Sdn Bhd Johor & Anor* [1998] MLJU 83; [1998] 3 CLJ 475; [1998] 2 MLRH 2023 (HC) lucidly explained '... Constructive

dismissal occurs when an employer repudiates a contract of employment The repudiation may take the form of a breach, anticipatory breach or notice of intention. It may be express or implied and it must go to the substance of the contract'. In the same case at p 498 the High Court observed as follows:

> If an employee asserts that he has been constructively dismissed, he must establish that there has been conduct on the part of the employer which breaches an express or implied term of the contract of employment going to the very root of the contract. It can safely be said that *one term which, if not express, may be implied in a contract of employment and if is that the employer will not make such a substantial change in the duties and status of the employee as to constitute a fundamental breach of the contract.*
>
> What has to be ascertained is *whether in all the circumstances of the case the responsibilities and duties of the employee have been so altered by the employer as to constitute a breach of a fundamental term of the contract of employment*.

[141] Whilst we recognise the bank's management prerogative to transfer and re-designate the claimant based on their business or organisational needs and circumstances, the exercise of that prerogative is not absolute and must stand up to curial scrutiny.

[142] It is axiomatic that an employer's exercise of their management prerogative to transfer and/or re-designate an employee can be struck down if it is demonstrated that the transfer/re-designation is in substance a demotion or a punishment or that the employee is being victimised or that the decision is actuated by mala fides.

[143] Thus, depending on all the circumstances attendant upon the transfer and/or re-designation, an employee may (not necessarily will) be entitled to complain that he has been constructively dismissed if he is able to show that the employer has made substantial changes in the duties and status of the employee as to constitute a fundamental breach of the contract.

[144] The case of *Wong Chee Hong* is the classic and perhaps an extreme or egregious example of a transfer which in the words of the Supreme Court amounted to a humiliation of the employee who was driven or forced out of employment. In that case, the employer was quite obviously annoyed that Mr Wong had concluded the collective agreement without referring it to higher management and they decided to relegate him to the position of cinema manager, which was a position which he had held several years prior to him becoming the Personnel and Industrial Relations Manager for the whole of Malaysia. By the transfer order, Mr Wong had 'fallen from grace' so to speak.

[145] In *Lewis v Motorworld Garages Ltd* [1986] ICR 157 the English Court of Appeal recognised that a fundamental term must be implied into a contract

of employment which requires the employer to maintain the duty of mutual respect and confidence, without which the contract of employment itself cannot be sustained. In that case, Gildwell LJ held:

> However there are normally implied in a contract of employment mutual rights and obligations of trust and confidence. A breach of this implied term may justify the employee in leaving and claiming he has been constructively dismissed: see *Post Office v Roberts* [1980] IRLR 347 and *Woods v WM Car Services (Peterborough) Lfd* [1981] ICR 666, 670, per Browne-Wilkinson J.

[146] In *Hotel Malaya v Goh Hock Fong @ Goo Hak Pong* [1994] 2 MELR 627; [1994] 2 ILR 810 (IC) the employee was first employed by the hotel on 1 February 1968 as a receptionist. In 1973 and 1975 he was promoted to the positions of assistant chief receptionist and front office manager respectively. On 1 April 1991, the employee was designated as the *manager in charge of the maintenance, security as well as the bell departments.* He was also appointed as a member of the management team of the hotel. A few months later, on 31 January 1992, the employee was transferred to the position of *manager (store).* The employee considered that by the conduct of the hotel in so ordering his transfer, he had been constructively dismissed and accordingly left the company on 14 February 1992. The Industrial Court stated that:

> Having appointed the claimant as one of the managers of the Hotel from as early as 1975, the claimant should not have been appointed to another position which was inferior to or lower in rank or status than that of the position of manager. Although the subsequent appointment of the claimant was to a position which carries the title 'manager (store)' without any change to his remuneration, the court is satisfied on the evidence adduced before it that *the position which he had been asked to assume was in essence and substance nothing more than that of a store keeper.* The court also finds the attempt by COW1 to redefine the claimant's duties as that of a cost controller as unconvincing.
>
> The truth is that the claimant was not given any overriding powers or authority to control costs in the various departments of the Hotel which he would need to have should he be expected to perform the managerial functions of such a position. Neither was the purchasing department placed under his supervision or control.
>
> The *conduct of the Hotel is tantamount to a reduction in the rank and status which the claimant had enjoyed before the transfer.* He had been expected to do duties, albeit, up to the day he walked out, these had not been clearly spelt out for him in any job description, which were *essentially the duties of a store keeper and not those of a manager.*
>
> *These duties did not commensurate with the managerial rank and status which he had held and which was purportedly also conferred upon him in his new position as manager (store).*
>
> In the circumstances in which the claimant was in at the material time, the new job functions which he was assigned to perform brought him humiliation and was in disregard of the due consideration and respect which he ought to have received from the Hotel.

[147] On the issue of the alleged breach of express terms/implied terms of the contract of employment, it is, we think, important at the outset to state that the claimant's counsel had conceded that the bank is contractually entitled to transfer and/or re-designate him depending on the bank's needs and commercial/business strategy or circumstances.

[148] Indeed, the claimant himself accepted that the bank was entitled to transfer (necessarily implying that the bank could also re-designate him). In this regard, in a letter elated 18 May 2012, the claimant wrote, '... Whilst I understand that the transfer of employees was a management prerogative, but such prerogative is not absolute, unfettered and cannot be exercise unreasonably and arbitrarily to the detriment of employee ...'.

[149] We may also add that an employer's right to transfer is recognised as a matter of law and is so sacrosanct that by virtue of s 13(3)(b) of the Act it cannot even be included as part of any collective agreement between a union and employer. It reads:

> (3) Notwithstanding subsection (1), no trade union of workmen may include in its proposals for a collective agreement a proposal in relation to any of the following matters, that is to say —
>
> (a) ...
>
> (b) the transfer by an employer of a workman within the organisation of an employer's profession, business, trade or work, provided that such transfer does not entail a change to the detriment of a workman in regard to his terms of employment;

[150] But the rider attached to the management prerogative of transfer is important and needs to emphasised, ie, 'provided that such transfer does not entail a change to the detriment of a workman in regard to his terms of employment'.

[151] It is relevant to refer to the Court of Appeal's decision in *Ladang Holyrood v Ayasamy a/l Manikam & 16 Ors* [2004] 3 MLJ 339; [2004] 4 AMR 621; [2004] 2 CLJ 697; [2004] 1 MLRA 341 (CA) where Ariffin Zakaria JCA (as he then was) referring to earlier cases relating to transfers at para [13] of the judgment stated the legal position as follows:

> 13. We now turn to the next issue, that is, whether the appellant has any right under the contract of service to transfer the respondents to the Main Division. In *Soon Seng Cement Products Sdn Bhd & Anor v Non-Metallic Mineral Products Manufacturing Employees's Union* [1996] 1 ILR 414 Award No 107 of 1997 the same issue came to be considered by the Industrial Court, There the court made the following observation which we think is highly pertinent to the issue before us:
>
> It is well established in Industrial Law that the right to transfer an employee from

A one department to another or from one post of an establishment to another or from one branch to another or from one company to another within the organisation is the prerogative of the management and the Industrial Court will ordinarily not interfere. But if the transfer is actuated with improper motive, it will attract the jurisdiction of the Court. The power to transfer is, therefore, B subject to, according to Ghaiye's Misconduct in Employment (at pp 254–255), the following well recognised restrictions:

(a) there is nothing to the contrary in the terms of employment;

(b) the management has acted bona fide and in the interests of its C business;

(c) the management is not actuated by any indirect motive or any kind of mala fide;

(d) the transfer is not made for the purpose of harassing and victimising the workmen; and D

(e) the transfer does not involve a change in the conditions of service.

[152] Hence, having due regard to the legal principles as enunciated in the cases as above-stated, it is fair to state that the transfer and redesignation here E did not offend any express term of the contract of employment between the claimant and the bank.

[153] Thus, the claim against the bank is necessarily confined to the claimant's contention that the fundamental term that had been breached (allegedly) is the F implied term that neither the employer nor the employee will do anything to destroy the relationship of mutual trust and confidence which is the bedrock of any employer/employee relationship.

G **[154]** In this case, the claimant contended that the bank's decision to transfer and re-designate him, taken together with all the attendant circumstances, including but not limited to the matters raised in the claimant's several emails, cumulatively gave rise to a breach of the (fundamental) implied term in the contract of employment that the bank as employer, would not do anything, or H act in a manner as would destroy the relationship of trust and confidence that must necessarily exist between the bank.

[155] In *Woods v WM Car Services (Peterborough) Ltd* [1982] IRLR 413; [1982] ICR 693; [1982] Com LR 208 (CA) at p 698 (ICR) Lord I Denning MR, said that an employer must be good and considerate to his employees and that he (employer) must not do anything to destroy the relationship of confidence between them. Lord Denning expressed the duty of trust and confidence in the following words:

... It is the duty of the employer to be good and considerate to his servants.

> *Sometimes it is formulated as an implied term not to do anything likely to destroy the relationship of confidence between them,* see *Courtaulds Textiles v Andrew* [1979] IRLR 84. But I prefer to look at it in this way: the employer must be good and considerate to his servants. Just as a servant must be good and faithful, so an employer must be good and considerate. Just as in the old days an employee could be guilty of misconduct justifying his dismissal, so in modern times an employer can be guilty of misconduct justifying the employee in leaving at once without notice. In each case it depends on whether the misconduct amounted to a repudiatory breach as defined in *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27.

[156] And as a result of the fundamental breach, the claimant alleges that he became entitled in law to lodge a protest, treat himself as having been constructively dismissed, and to walk out of employment as quickly as possible.

[157] However, if an employee who is similarly circumstanced as the claimant, claims to have been constructively dismissed, stays on in the new position (which he complains of) for a period which is longer than necessary, then there is a risk that the delay in walking out may be construed as an affirmation of the contract of employment which has been 'unilaterally varied' by the employer. It is therefore essential, imperative and necessary for the employee to make up his mind soon after the changes to the terms of the contract are implemented by the employer.

[158] On the question of delay, non-protest and acquiescence it is important to note that the transfer/re-designation was to take effect on 1 June 2012. And even before he took out the new position, the claimant had in his email elated 18 May 2012 to Ramlah stated, inter alia:

> Furthermore in this inferior position. *I am required to work alone and there is no longer any Relationship Manager/Deputy Manager/clerical staffs or PA reporting to me.*

[159] Thereafter, about a month and eighteen clays after he had taken up the new position, the claimant sent a letter dated 18 July 2012 addressed to Ramlah, where he stated:

> CIMB management choose to ignore, remain silence and failed to respond to any of my letters and e mails on various mentioned dates.
>
> I am also relegated to a lesser important position compared to previous Commercial Manager job functions. My new job functions are reduction in status, diminution in power and authority.
>
> In this demoted position, despite my title as Team Leader, I'm require to work alone without any team members. I no longer have a specific room (only cubicle as per confirmation with Damian PA) given to me with no officer, Clerical staffs; PA reporting directly to me Among jobs function of SAT if we were to compared with ACM are as follows ...

I'm require to do officer jobs function on item No 2 & 4 which is the most crucial parts of SAT job functions, As a Team Leader, I have to key in all the necessary information in BCS system, write loan paper and initiate loan documents. All these functions was previously undertaken by my x officers at Kedah/Perlis Area Commercial Center.

The bank claims, my transfer is a lateral transfer but in actual effect, I am undertaking the job functions and roles of an officer and not a Manager.

To further rub salt to the wound I was given an unrealistic 2012 KPI with only six more months to go with no staff to assist and at the same time is expected to undertake the functions of an officer via your internal e mail dated 18/6/2012. The purported redesignation to SAT as stated in your letter dated 8/5/2012 is nothing but a series of actions to legitimise what in effect a demotion with an ulterior motive to drive me out of my employment Among SAT main KPIs which significantly contributed to almost 50% of total score are items no 1 and No 2.

It is very important to have sufficient number of officer in order to perform our jobs and deliver performance within management expectation, Items No 1 & 2 will subsequently determine the fate of KPI score of items No 3, 4, 5.

As you can clearly see from the above statistic, SAT target given to me doesn't correspond with other Commercial Center in Northern Region To make the matter worse no consideration is given at all as I don't even have any staff at the point of KPI being delivered to me on 18/5/12 Based on the above statistic, how do you expect SAT to performance?

To further substantiated that there is an element of mala fide with unrealistic target, I append herewith LAA achievement of 4 Commercial Center as at March 2012.

I have been at SAT unit since 1 June 2012 (temporary based in Alor Setar) and up until the date of this letter, nothing has been communicated to me either verbally or in writing that I'll be getting a staffs to assist me in my daily works. Furthermore, I also do not have any business card, bank letter head, rubber stamps and other relevant documents for SAT requirement.

Email to this effect was sent on 10/7/12 and 12/7/12 respectively.

I found it is almost impossible to work with this kind of restriction. How do you expected me to perform better than the others commercial center who are are [sic] fully equip with necessary infra/equipments/staffs but yet their target is very much lower than me.

[160] In the letter dated 18 July 2012 the claimant gave various facts and figures which were tabulated to back his grievances. The bank responded via letter dated 20 July 2012 which clearly did not address any of the issues raised in the claimant's letter.

[161] All that the bank did was to say that the transfer was due to operational reasons and went further to ascribe to the claimant, a sinister motive in the issuance of the emails. The bank construed the claimant's emails as a tactic at

deflecting the bank's investigations into the claimant. But Chua went on to say that the bank's reply dated 20 July 2012 was a sufficient response to the claimant's letter dated 18 July 2012.

[162] In our view, having regard to all the circumstances and the antecedent facts, the bank's response via letter dated 20 July 2012 served only to fortify the claimant's stand that the bank had turned a deaf ear to his plight and his grievances.

[163] Thus, if we were to circle back to the applicable test for constructive dismissal, ie, is the 'contract test', it is clear that the occasion on which an employee can complain that he had been constructively dismissed is when he can demonstrate that there has been a *nonconsensual or unilateral variation of the* contract of employment by the employer.

[164] Hence, on such an occasion, the dissatisfied employee is entitled to consider the variation to be a repudiation of his contract and is entitled to complain that he had been constructively dismissed and so he must, *as soon as he perceives that his contract has been varied without his consent, walk out of his employment.*

[165] If he stays on without protest and continues to work under the new terms/conditions imposed on him by the employer, the employee will be regarded as having affirmed the contract and impliedly consented to these changes. For a complaint of constructive dismissal to succeed in the Industrial Court, it is essential that the employee should act with haste.

[166] The question is — did the employee make up his mind and act at the appropriate point in time soon after the conduct of which he had complained had taken place?

[167] It is of course fatal to a claim based on constructive dismissal if there is undue delay in responding to the changes that were imposed by the employer or generally, in reacting to the repudiatory conduct of the employer. But in dealing with the issue of delay it is necessary to ascertain whether the employee had or had not protested during the relevant period in question (see: *Marriott v Oxford and District Co-operative Society Ltd (No 2)* [1970] 1 QB 186; [1969] 3 All ER 1126; [1969] 3 WLR 984 (CA)).

[168] It is trite that in cases involving direct dismissal where the employee is actually dismissed by the employer, the burden is on the employer to prove to the satisfaction of the Industrial Court that the employee was dismissed for just cause or excuse.

[169] However, in a case where the allegation is that the employee has been constructively dismissed, the burden falls on the employee. Thus, as the protagonist of the claim (based on constructive dismissal), the claimant had the legal burden of proving that the bank had repudiated the contract of employment. In this context, what the claimant had to establish was '... conduct on the part of the [the bank] which breaches an express or implied term of the contract of employment going to the very root of the contract' (see: the decision of the High Court in *Moo Ng v Kiwi Products Sdn Bhd Johor & Anor* [1998] MLJU 83; [1998] 3 CLJ 475; [1998] 2 MLRH 2023 (HC)).

[170] In the present case, the Industrial Court concluded that the claimant had failed to establish the necessary legal ingredients for a claim of constructive dismissal. However, the judicial commissioner disagreed with the Industrial Court and held that the claimant had established that he had been constructively dismissed and accordingly quashed the award and granted the requisite monetary reliefs. The appeal before us is directed at the said decision of the judicial commissioner. The bank therefore seeks to have the High Court's decision set aside and for the award to be reinstated.

[171] One of the claimant's issue was that he had to work alone. There is nothing by way of evidence to suggest to the contrary. The claimant also complained that he was being relegated to doing what he had done before being promoted to ACM and that these were tasks that were handled by his subordinates when he was ACM.

[172] We are mindful that in terms of changes to the duties and responsibilities, in *Shahabudin v Talasco*, the employee said that he had been constructively dismissed inter alia because he had to perform duties previously assigned to his subordinates. Ultimately, the claim did not succeed. In *Shahabudin v Talasco* the employee had claimed that as a result of a re-organisation exercise undertaken by Talasco, he was demoted in rank:

(a) as the post of Chief Accountant which he headed in the Accounts Division previously was redesignated as Accountant (Corporate);

(b) as he had to report to the Senior Manager, Finance and Administration, a post filled by a newly recruited officer who was placed in the same salary grade as him;

(c) as he was asked to move into a smaller room;

(d) as his former subordinates were no longer reporting to him;

(e) as he had to perform duties previously assigned to his subordinates; and

(f) as he was not informed of the redesignation and change of work.

[173] The Industrial Court held that the re-organisation of Talasco was made mala fide and that their cumulative conduct is unfair and unreasonable and amounted to there being a unilateral variation of the contract of employment entitling the employee to treat himself as being constructively dismissed by Talasco.

[174] The High Court disagreed with the Industrial Court as the latter had asked the wrong question for the real issue was whether there has been a change in the terms and conditions of the employee's employment which worked to his disadvantage as a result of the reorganisation.

[175] The Court of Appeal opined that it was necessary to look at the reason for the re-organisation and ask whether it was done mala fide as found by the Industrial Court or for a legitimate purpose as found by the High Court? In dismissing the employee's appeal, the Court of Appeal said:

> There is evidence to show that the re-organisation was necessary as the respondent was running into debts and was faced with the prospect of winding its business and retrenching its employees. To avoid taking that drastic action the respondent decided to reorganise itself and make itself more viable and profitable. That was the only practical solution that the respondent could take and in this way it was possible to retain the employees and as such the appellant had no cause to complain as he was still gainfully employed and there was no change in his duties following the re-organisation. Likewise he was paid the same salary and perks previously enjoyed by him.
>
> The only change perhaps was in the redesignation of his post as he was no longer known as the Chief Accountant but as Accountant (Corporate). He also had to report to a new Head his immediate superior in the newly organised department, and someone who was newly recruited. He also resented the fact that he was put in a smaller room and accumulatively he maintained that these factors amounted to a demotion.
>
> The High Court disagreed and we support that finding as these changes were administrative changes following the reorganisation and do not have the effect of breaching any term of the appellant's contract of employment — at least there was no evidence pointing to such a conclusion.
>
> His other complaints are too trivial to amount to there being any breach of any term of his contract of employment.

[176] But we equally aware that in *Hong Leong Bank Bhd v Lee Sang Huat* [2005] ILJU 88; [2005] 2 ILR 172; [2005] 1 MELR 632 (IC), a claim of constructive dismissal where a similar complaint was raised, had succeeded before the Industrial Court. The employer (Hong Leong) then applied for judicial review and the Industrial Court's award was quashed. See: decision of Justice Alizatul Khair Osman Khairuddin (as she then was) in *Lee Sang Huat v Hong Leong Bank Berhad & Anor* [2011] 1 LNS 1056 which pertained to

Application for Judicial Review No R4(R2)-25–114 of 2005.

[177] Thereafter, the employee challenged the High Court's decision and the appeal succeeded. See: the order of the Court of Appeal in Civil Appeals No W-02–313 of 2010 and W-02–386 of 2010 both dated 26 February 2013 wherein the panel comprising of Justice Dato' Hj Abdul Malik bin Hj Ishak JCA, Justice Dato' Azahar bin Mohamed JCA (later Chef Judge of Malaya) and Justice Dato' Anantham Kasinather JCA reinstated Award 817/2005. However, the Court of Appeal did not furnish full grounds. We turn now to the facts of *Lee Sang Huat*.

[178] The following synopsis for the case of *Lee Sang Huat* is from the ILR:

> In this claim for unfair dismissal, the primary question that arose was whether the claimant's transfer — from his position as Assistant General Manager of the Credit Evaluation Department ('CED') of the bank to a Branch Manager — was essentially a demotion in rank — such that the claimant was justified in alleging constructive dismissal against the bank. The bank averred that the transfer was not a demotion as the claimant's job grade, his seniority as well as his remuneration had all remained intact (indeed, claimant stood to gain an extra allowance of RM650 per month). The claimant nonetheless contended that the transfer was a demotion, as it had entailed a loss in his status and decision-making powers.
>
> Clearly, if the transfer was a demotion, the claimant's refusal to serve his new post would seem justified, and the only question that remained to be answered was whether the (constructive) dismissal was unfair, and if so whether the claimant was entitled to backwages and reinstatement sought for. Held (for the claimant):
>
> [1] *The claimant's transfer from his position as AGM in the CED to a Branch Manager, a position which the claimant had held for seven years in his younger days, was a demotion notwithstanding that there was neither a salary reduction nor a change in job grade*. The claimant had suffered a loss of powers which he had once enjoyed, and this loss was not limited to the reduction in his loan approval limits but extended to the fact of his having gone down in the organisation's reporting structure.
>
> As enunciated in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd*, the claimant could not be expected to 'accept a transfer with a demotion in rank' (p 188 a-d).
>
> [2] The delay from 6 April 1999 (date of transfer letter) to 26 July 1999 (date claimant cited constructive dismissal) was not excessive. The actions of the claimant in seeking a revocation of the transfer showed that he had not, at any time, waived the breach. Further, *the claimant could not be faulted for exhausting all possible avenues to resolve the impasse before walking out of his employment* (pp 189 d-f).
>
> [3] It was the claimant and the claimant alone who was selected for transfer to a Branch. This fact, coupled with the fact that the previous branch managers of Bandar Sunway Branch were infinitely much more junior than the claimant, showed that the claimant had been victimised.
>
> The bank had demoted the claimant without any charges/disciplinary action being levelled or taken against him (pp 190g–i, 191a)

[4] The bank, by demoting the claimant, was in breach of a fundamental term in his contract of employment and had evinced an intention not to be bound by it. *There was a breach of the implied term of mutual trust and confidence which went to the root of the contract.* The claimant, in short, had been constructively dismissed (p 191 a-c).

[179] Based on the evidence, it is clear that the position of SAT leader was an inferior position which required the claimant to work alone and without any Relationship Manager/ Deputy Manager/clerical staffs or PA reporting to him. The targets that were imposed were manifestly unrealistic and unachievable as he was alone on the mission that was assigned to him. In the circumstances, the claimant's assertion that he was given this unachievable task which was doomed to fail was not far-fetched. There is no evidence that the claimant had anyone supporting him as SAT leader and contrary to Seng's evidence, there was no evidence that the claimant had a free hand to hire anyone or that he was even told that he had a free hand.

[180] The contemporaneous documentary evidence simply did not back up the bank's evidence and given that the bank was (allegedly) investigating the claimant at the time when the transfer order was issued, it raises the question as to whether the claimant was 'chosen' to be SAT leader and given a target of RM127m within six months without any support so that he would fail, which would then give the bank a basis to dismiss him for poor performance.

[181] Of course that would be speculative, but we are left with a nagging suspicion that this is in fact the case. At any rate, on the basis of the position that was established in *Lee Sang Huat*'s case as approved by the Court of Appeal, on the facts and the circumstances of the present case, the transfer of the claimant to a position where he had to perform tasks which he had performed before he became ACM was in our view, a demotion notwithstanding that there was neither a salary reduction or change in job grade.

[182] By issuing the transfer and in failing to manage the claimant's various pleas for intervention by the bank, there was a fundamental breach of the implied term that the bank would not do anything to destroy the implied term of mutual trust and confidence that is the bedrock of any employer/employee relationship.

[183] In this case, it was part of the claimant's complaint that he was given tasks which his subordinates had done when he was ACM and which he had done before he became ACM. He also had other complaints. But does this mean that an employee can claim to have been constructively dismissed merely because he had been re-designated to perform tasks which he had done previously before being promoted. In our view, such a proposition would be

too broad and sweeping and may result in spurious and unwarranted complaints of constructive dismissal. Thus, the answer to this question would be — at all depends.

[184] Hence, by way of example, the case of *Wong Chee Hong* may be regarded as an egregious case of an employee being asked to perform tasks which he had performed many years before he became the head of the Personnel Department for the whole organisation. But this cannot be seen in isolation. There was an added factor, namely, he was being punished for concluding the collective agreement with the Union without consulting management. There is usually no one single factor or feature in cases of this nature.

[185] The case of *Lee Sang Huat* is another example of the branch manager being asked to perform tasks which he had done in the earlier years within the organisation. And added to that, was the fact that his powers responsibilities and status was drastically reduced to the point where he considered himself constructively dismissed and had to walk out.

[186] The present case has its own unique features. In our view, the present case has shades of similarity with the case of *Lee Sang Huat.* To conclude on this point, it is our view that each case must be examined on its own facts and the Industrial Court must endeavour to ascertain any underlying motives or reasons as to why the employee was being placed in the position which he is complaining of. In this case, the claimant complained that he had to work alone, and was made to perform tasks which his subordinates had done whilst he was ACM and which he had clone before becoming ACM, and had to 'hunt' for new customers to take loans to the tune of RM127m within six months. This was by all accounts, an unrealistic and unachievable task particularly since the claimant would be starting in a new area (Penang) from ground zero with no network and no connections.

[187] And it is also quite relevant that when the transfer order was issued, the claimant was under 'investigation'. The nature of the investigation was not disclosed during the hearing before the Industrial Court. And just shortly before the transfer order, the bank had informed the claimant that he had under performed in 2011 and would not be receiving any performance bonus or annual salary increment.

[188] If the Industrial Court had meticulously scrutinised the evidence, it is highly unlikely that it would have found against the claimant. Based on the facts and circumstances, we are satisfied that the evidence pointed overwhelmingly to the conclusion that the claimant was being placed in an inferior and invidious position. It was by all accounts a demotion.

[189] In light of all that took place including the several emails by the claimant to the bank etc, it is strange that the Industrial Court could say that the claimant did not protest. The Industrial Court's finding, that the claimant did not protest flies in the face of the evidence. It was obvious that the claimant was making every effort to seek a good outcome and to extricate himself from the position in which the bank had put him.

[190] He walked out after one month and 18 days as Team Leader of the SAT whilst temporarily located in Alor Setar. Even if there was delay on the claimant's part, on the facts here, it cannot be construed as an affirmation of the unilateral variation of the contract of employment.

[191] In this case, the learned judicial commissioner was of the view that there was no affirmation or acquiescence by the claimant (see: paras 69–73 of the High Court's grounds of judgment). We agree with the conclusions that were reached by the learned judicial commissioner.

[192] We have no hesitation in rejecting the bank's suggestion that by asking for stationary and business cards the claimant had acquiesced to or consented to the breach by the bank. On a final note, we do not agree that the taking away of the motorcar and allowance are a manifestation of a breach as these are benefits that come with the position of ACM. To that extent, we do not agree with the claimant that this can be relied upon as a ground to claim constructive dismissal.

[193] In the result, we agree with what the claimant had stated in his email dated 18 May 2012 to Ramlah '… the transfer of employees was a management prerogative, but such prerogative is not absolute, unfettered and cannot be exercise unreasonably and arbitrarily to the detriment of employee'.

[194] Thus to conclude, we agree with the decision of the judicial commissioner who granted certiorari and quashed the award on account of errors of law that had been committed by the Industrial Court.

[195] This is a case where the Industrial Court had clearly omitted to consider important aspects of the evidence which supported the claim for constructive dismissal. The Industrial Court had erred in concluding that the claimant had taken on the new role as SAT leader without protest.

[196] We are convinced that this is an exceptional case where a claim for constructive dismissal was wrongly dismissed by the Industrial Court when the evidence pointed to the contrary and where following the principle established by the Court of Appeal in *Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar Singh* [2000] 3 MLJ 714 ; [2000] 1 MLRA 664

(CA) judicial review was warranted because any tribunal which is similarly circumstanced would have concluded that the transfer order was a demotion and that the claimant was being placed in a position which was inferior to the position of ACM and that the bank was guilty of a fundamental breach of the implied term of mutual trust and confidence.

OUTCOME

[197] Thus, for the reasons as stated and discussed above, it is quite clear to us that there are no merits in the appeal as the judicial commissioner acted well within the parameters of the High Court's supervisory judicial review jurisdiction in quashing the award.

[198] We are satisfied that this was an appropriate case for the High Court to scrutinise and review the Industrial Court's decision on its merits which was plainly irrational (see: *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 2 MLRA 114; [2003] 4 CLJ 625 (FC)). The bank's appeal is hereby dismissed with costs of RM10,000 (subject to allocator).

Appeal dismissed with costs of RM10,000 subject to allocator.

Reported by Dzulqarnain Ab Fatar